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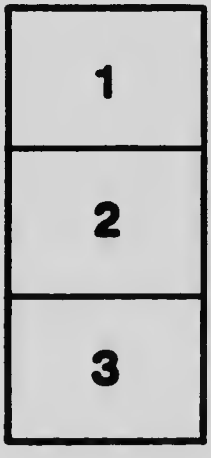

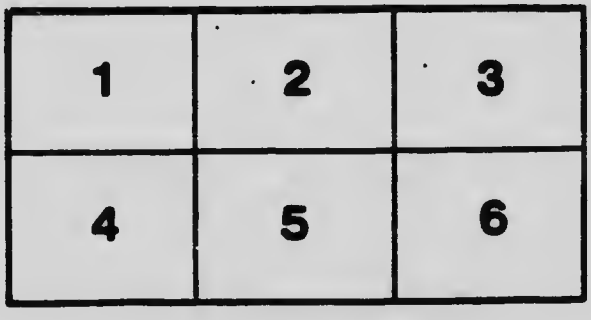

To
Hon T. W Rowell
from
The authors

New years greeting
Jany 1, 1919

THE MODERN LAWSUIT

THE MODERN LAWSUIT

:: :: SOME OF ITS STEPS :: ::

A MESSAGE TO THE PROFESSION

By

A BARRISTER OF OSGOODE HALL

1915

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CONTENTS.

PREFACE.

"The Modern Lawsuit" is a concise treatise embracing some impressions by the way in the writer's practice and more mature study and later application of the laws of the land.

This modest message is simply a look backward and forward, after the ups and downs of trial and appeal work had often suggested some permanent personal record of the counsel's view and of the judicial view of law and procedure, as they appear after some considerable familiarity with the one and the other from each viewpoint.

Law reform having now reached the point at which bench and bar welcome, as a distinct advance, the new system, it is not amiss to recall for contrast the old system of jurisprudence so wisely at long last shaken off.

As is well known the Victorian era opened upon the old system with its absurd technicalities and fictions and forms, and closing left the law and its procedure under the new system whose methods, though some degrees below perfect, are founded on common sense and better fitted to promote justice and a popular sense of fair play among litigants.

That great mental contest (the greatest known to mankind), the forensic trial, has been raised nearer to its true dignity. Its intricate machinery has theoretically at least the same motor and the same governor for the lettered and unlettered, for the fat and the lean, in each case efficiently performing its prime functi grinding out the truth on the issue under the law.

The philosophy of "The Modern Lawsuit" is that a stagnant system of jurisprudence, like any other stagnant system, is a failure. Its moral is to teach the need of still further law reform to the end that law procedure shall be simplified and

levelled to the average intelligence, that whatever unwarranted cost and delay and fiction and technicality survive in the lawsuit of today shall be still further pruned and cut down to the limit of good sense and equal rights to all.

Relatively there is little to complain of, as we recall historically the tortures and tyranny of the dim past. Yet the thinkers of bench and bar see room to improve even the new system.

And after all we have much to commend, when we find that liberty and justice are nowhere more jealously safeguarded and that nowhere are bench and bar more fit and incorruptible and nowhere is public sentiment more free and independent than under the standard of this nation.

THE MODERN LAWSUIT

The Modern Lawsuit.

CHAPTER 1.

THE LAWSUIT: ITS ORIGIN.

While the strides of the nineteenth century in jurisprudence cannot be said to stand foremost as compared with those which thrill the thinker of today when he contemplates the onward and upward march in general science and art, yet the legal mind has been distinctly stirred by the sweeping advances of civilization. And while that century lays just claim to so much and such effective work to soften the hard-hearted and to christianize the thinker, the twentieth century will do still more. This may savor of rash optimism in the very heat and blood and savagery of the present gigantic raid on the lives and stores of the civilized world. At a time when red-handed and robber-like it is boldly proclaimed to the world that the strong must *not* help the weak,

that a nation professing to be civilized and christian may with God's benediction raid and rob its weak neighbor, one halts to pronounce this the greatest age of civilization and christianity. A side-glance at this ruthless war movement is relevant to an analysis of the laws which govern this age. How far we have displaced that motto that might is right by the mellow doctrine that under modern law the strong must help the weak, is of wide and absorbing interest to bench and bar.

All said and done, it is safe to affirm that the marvels of invention in the diverse fields of human affairs have in their sweeping march impressed in the upward movement the jurist, thus adding largely to his wisdom, his philosophy, his ingenuity.

This is given emphasis by a passing comparison of the old-time action at law or suit in equity as distinct from the modern lawsuit. A brief consideration of the old practice, with its often mean-

ingless fictions and absurd rules as seen through twentieth century spectacles, may well open an analysis of the law suit of to-day and its origin.

The scope of this little treatise permits of merely passing impressions upon that venerable system which after all did serve certain useful purposes in the light of the rugged centuries gone by, affording relief in many of the countless cases in which the enforcement of rights legal or equitable and the redress of wrongs of like complexion were gropingly sought by the suffering suitor.

The old system surely lent emphasis to the remedy rather than the wrong itself and (as cannot be denied) to the form not the substance. Hence the early text-writers wrote of forms of action. The right to be established or the wrong to be redressed was a simple matter: the gateway to the court was complex in the extreme.

Of the many treatises classifying those forms of action, few indeed are clear and concise, while no single writer has aimed to afford all the modern lawyer needs for even a birdseye view of the perplexing theme.

The law of England was enforced in the courts by suits begun by writs. Those writs were issued by the King or his chancellor or the latter's clerk. They were composed in the office of the court of chancery and made to fit the varied complaints of the suitor whatever his ailment. When launched the writ became the first step in the suit. If wisely and well fitted to the case, the machinery of the courts operated with due effect; otherwise the suitor was the sufferer. Here it will be borne in mind that although chancery in its wisdom framed the writ, its fitness for the case was not absolutely warranted. An action in a common law court might not lie unless the form of that action was deemed fit and proper (a) by the chan-

cery clerk who drafted the writ and (b) by the common law judge who was to try the case. The result was many a suitor learned by sad if not swift experience what it meant to be at once "right in equity and wrong at law."

Obviously a large percentage of the writs issued from the chancery were along well-cut and well-recognized lines insuring accuracy and safety as to the form of action. It was of the remaining and considerable proportion of writs issued rather experimentally that the suffering suitor had high cause to complain and through which justice too often failed miserably and hopelessly.

At first blush the lawyer of today practicing under a happy and logical fusion of law and equity, consummated by the Judicature Act, belittles the unspeakable and unthinkable hardships and worries and delays and wrecks of the old-time forum. Yet poring over the imperfectly reported cases where suitors went without

their day in court because there was no fit form of action to meet their just claims, he clearly realizes to what an absurd system England for centuries tamely submitted up to that glorious Victoria movement when the able work of the several law commissions of the nineteenth century culminated in the Common Law Procedure Act, 1852, and the Judicature Act, 1873.

It has been said that to the indifferent lawyer procedure is distinctly a nuisance, because it is the slavish and shifting task of his calling. Yet, generally speaking, those in the front ranks of the profession are in the main the men not too busy nor too shiftless to master the elusive intricacies of practice and procedure. A layman is excused for looking to the substantive law for a defining of all his rights and duties. Not so the lawyer who well knows that, however illogical it may seem on the face of things, yet in truth our legal rights and duties are evolved, in the practical

every-day affairs of life, from that governing part of our jurisprudence grouping under the head of adjective law.

It has been said, I think safely said, that rules of practice win or defeat more cases, nonsuit more litigants, strike out more pleadings than either substantive law or the evidence itself; that most faltering lawyers drop by the wayside on the procedure so simple and so despised; that a sure and silent death thus buries the cause beyond resurrection. If this be true; to dissect and master each rule is to reach the goal.

Procedure is the sceptre of the bench; law without rules is meat without seasoning. The rule is the key to the remedy.

For hints on procedure and practice counsel turn almost automatically to those admirable modern analyses of the Judicature Acts of England and of the several law districts looking to England as the fountain of their laws and rules.

In considering the origin and incidents of the lawsuit, we cannot well escape a brief inquiry likewise into the origin of substantive law. We know that man in a state of nature bowed alone to the law of the beast, the right of the strongest. We know that what for want of a better term I shall call our "social compact" has made us all members of a great society involving mutual rights and duties, or laws.

That these laws are based on the will of the Creator and the needs of civilization is the cardinal guarantee for universal acceptance in theory and in practice. The basic plank of Divine will is common to all human law. That society to which we belong must fall to pieces, back to its original atoms, to the law of the brute, so soon as that cardinal plank drops out. If man is created with a distinct mission to subdue the earth and rule its creatures, it can scarcely be idle to consider the wondrous works of nature

and their Supreme Author as the basis of human law. If we are given the right to rule " over the fish of the sea and over the fowl of the air and over every living thing that moveth upon the earth," is it not the part of wisdom to seek light from the fountain of Divine law as the source of human law?

Man then in a state of nature proudly launches with the absolute right to life, liberty, happiness and all the property of the earth, which human laws later on limit only in so far as not to infringe the one upon the other's rights and privileges. Passing by that realm embracing rights of the mind wherein man's natural rights are intact through it all, we are here touching those civil rights which man takes in exchange for certain of his natural rights coming quite logically under heads looking to his security and protection as a social member.

In these impressions then we are first concerned with the scope, the definition,

of the suitor's rights and duties. These are prescribed by laws or rules of action *for* what is right and *against* what is wrong. The principle of these laws is as fixed as that of the laws of motion or gravitation or mechanics or of Deity himself.

While the laws of England have been developed with relation primarily to the law of God, we readily see that being after all largely human reason they must trace their origin from such homely and practical local conditions as (a) industrial pursuits (b) soil (c) territorial location (d) climate, and the like.

A glance at the great division of laws into (a) common law (b) statutes and (c) equity, invites at the threshold a consideration of the various courts which administered those laws. Equity was sought in the court of chancery, while the common law courts were concerned with the others. The rise and growth of the chancery court is of striking interest in the history of our jurisprudence, from

its modest and limited beginning for the purpose of framing fitting writs for all conceivable causes of action down through the generations to the protracted era in which that court with its great equity lawyers prevailed over the common law courts with their common lawyers. Originally the King of England was himself wont to issue the writ as a cue to the setting of the law in motion by way of lawsuit. This in time gave place to his chancellor or the chancellor's clerk framing and launching the writ. And those writs, as can readily be conceived, covered numberless kinds of causes of action, hence increased and multiplied to alarming number and variety.

Touching forms of action on contract as distinct from those sounding in tort we find such types as (a) debt (b) covenant (c) account (d) assumpsit; and under the head of tort we have (a) trespass (b) trover (c) case (d) replevin (e) detinue.

Each of these forms of action, like every other form of action, might only be launched by its appropriate writ. Back in the eleventh century we find the King himself exercising these functions, at first in person and later under his approval his chancellor assumed the prerogative.

Among quaint forms was the primitive writ of right modelled in this fashion:

"The King to (defendant's name) Greeting: We command you that without delay you do full right to (plaintiff's name) of one messuage with the appurtenances (description) which he claims to hold of you by free service of £— per annum for all service, of which X deforceth him. And unless you will do this, let the Sheriff of —— do it that we may hear no more clamor thereupon for want of right."

The attention is attracted by such strange-sounding forms at common law as (a) in the per and (b) in the post,

queer conceits in the wondrous lists of the ancients.

Such are of the many curious forms in use in ancient days, and those gradually increased from the eleventh to the nineteenth century until their number and variety became appalling. These old writs were sealed with the king's seal of which the chancellor was and is the custodian.

The Second Statute of Westminster 13 Edward I. Chapter 24 is in this connection of special interest. It provided for the issue of writs *in consimili casu,* by which in new cases similar to old ones the chancery clerk might frame new forms of writ to fit the new cases.

Gradually the chancellor alone and later with the vice-chancellor came to administer in the court of chancery the principles of equity in all its branches and they are many. But a strong and high fence separated equity and common law, and on either side operated the chancery

court and the common law courts respectively. "The rules of equity and good conscience" were being freely administered by the chancery court exclusively in the sixteenth century and this exclusive jurisdiction continued with ever-widening sway until narrowed by the Common Law Procedure Act 1852 and practically abolished by the Judicature Act 1873.

It is well-beaten ground, painfully familiar to the profession, that the suitor who won his case in a court of common law was frequently met with the solemn assurance that he was "right at law but wrong in equity." And while the chancery court in a case of this character was loath to attack directly the common law court or its judgment, the goal was reached by an ingenious injunction personally against the suitor himself from enforcing his judgment honestly fought and regularly won at law. This state of affairs, however harsh and illogical it may appear, continued practically until the

enactment of the Judicature Act sec. 24 that no cause or proceeding at any time pending in the High Court should be restrained by prohibition or injunction. Prior to that Act the chancery court could say: "You should not have sued in a common law court, hence you are now stayed."

Speaking of antiquated forms, perhaps John Wesley's view of the old chancery bill is worth quoting. He was sued in chancery in 1745 and says of the chancery bill which he had to meet: "I called on the solicitor I had employed in the suit lately commenced against me in chancery, and here I first saw that foul monster, a chancery bill. A scroll it was of forty-two pages in large folio to tell a story which needed not to have taken up forty lines, and stuffed with such stupid senseless improbable lies, many of them, too, quite foreign to the question, as I believe would have cost the compiler his life in any heathen court either of Greece or

Rome, and this is equity in a Christian country."

While this is the dictum of an interested party, the books are teeming with sweeping criticism of like import extending as well to many of the old common law forms of action.

With deep satisfaction the thinking lawyer reflects that the reign of Victoria saw the great law reform movement, beginning in the thirties of the nineteenth century and culminating in the grand achievement of the Judicature Act 1873, fusing law and equity and practically abolishing forms of action, thus giving us the modern lawsuit. If Victoria's reign rested on this alone, it would well justify the eulogium of the Victorian era spread on the pages of Volume 31 of the Canada Supreme Court Reports, incorporated in the following extract therefrom: "Minutes of the proceedings at the opening of the winter session of the Supreme Court of Canada Feb. 19, 1901.

The Acting Chief Justice said in part: That the Victorian era closing Jan. 22, 1901, must forever remain a notable epoch in the world's history is a proposition so universally conceded that it may be treated as a truism. Though a review of the civilized progress which is linked with Victoria's name is not to be expected here, an exception may be allowed for an allusion to the great improvements in the laws more immediately connected with the administration of justice and the courts entrusted therewith which during Victoria's glorious reign have been, at various times, enacted in her name by the Imperial Parliament, and re-enacted in Canada by our legislative authorities. A detailed history or even a simple enumeration of that beneficial legislation would be too long, but the subject, suffice it to say at present, is one that should not, in the future, escape the attention of those who will undertake to recall the remarkable traits of that remarkable reign. To

Victoria the mightiest of monarchs, yet the slave of the law of the realm the adjournment of the court will be ordered as an act of respect and a tribute of grief and sorrow.

The Solicitor General of Canada said in part:

In other places we have heard Her Majesty spoken of as a great constitutional monarch and her reign has been described as the last stage in the complete development of our free institutions. I may venture to say that to us of the bar our sovereign stood for something more. She was *fons et origo justitiae,* and if the waters of the streams of justice ran so pure and undefiled throughout her long and glorious reign it was because the source from which they sprang was so absolutely pure and without taint. She made her kingdom a kingdom of the law, and paraphrasing Sydney Smith, I may say she guaranteed equal rights to unequal possessions, she gave equal justice to rich and

poor alike. Of the many benefits for which we are indebted to Victoria the Good, not the least is the judicial bench of which we are so justly proud. Of that bench as of her throne it has been truly said that a fierce light beat continually upon it, and the dignity and honor of our judges have remained untarnished and unimpaired."

The English Judicature Act is liberally referred to because the law districts of Canada in the main have incorporated its wise provisions in the procedure statutes of the different provinces. Hence today a lawsuit is begun without reference to any of the old-time forms of action. The writ is endorsed in clear, concise, every-day language, and substance takes the place of form.

Again the rules of equity and the rules of law are concurrently applied in all the courts, the court of chancery in the old sense of the term is abolished, and the modern lawsuit is not an enigma but

a plan proceeding on a plainly and briefly stated issue in which form always bows to substantial justice. These conclusions are well borne out by reference to the Judicature Act of the great province of Ontario enacted in 1881 and carried into the Revised Statutes of Ontario 1914 as chapter 56.

CHAPTER 2.

THE TRIAL: ITS CONDUCT.

The modern trial can the better be appreciated by a glance at the trial as formerly conducted.

In a review of the ancient trial we may in passing touch upon the criminal trial and some of its more striking incidents. And first, as the lawyer well knows, the offences formerly capital falling under over two hundred heads are now reduced to less than half a dozen. There were formerly very few felonies not punishable with death; today the death penalty is comparatively rare except for murder. In the good old days death was the penalty for such offences as (a) stealing five shillings worth (b) vagrancy (c) stealing over a shilling from the person.

The plan of this treatise is not of course to invite the profession's attention to each

and every step of either a criminal case or a civil cause; but rather to consider certain of the more striking features finding their place under the old practice as distinct from the incidents of the modern trial. In this way may we at this point consider together, as leading up to the trial proper and its conduct, not alone primitive conditions and conceptions of the lawsuit but as well how the forensic trial was staged and managed and how the truth was ground out, for the fixing of the rights of the parties at issue.

Recalling some of the quaint methods of trial known to the centuries gone by we have (a) wager of law (b) wager of battle (c) ordeal.

Wager of law, a forerunner of the modern trial by jury, was a proceeding under which a party to the action might prevail in his cause by adding to his own oath the oath of eleven neighbors in corroboration. The official designation of those neighbors was " compurgatores " and their func-

tions were in some respects like those of modern jurors. Although the similarity is a limited one it justifies the historical linking of the ancient " compurgatores " with the jurors of the present day. While this mode of trial has undoubtedly more basis in reason for its adoption than the " battle " or the " ordeal," even it is crude and ineffective compared with the jury trial of today.

Wager of battle was the deciding of the issue between the parties to the suit according to their superiority *inter se* as prize fighters. The better fighter won the suit. Then brute force and skill in the prize ring stood high. See Ashford v. Thornton (1818), 1 B. & Ald. 405, which led to the barbarous practice being formally abolished by 59 George 3, Chapter 46.

Of course no modern lawyer would venture on grounds of " human reason " or " civilized sanction " to defend this savage mode of trial, yet it boasted in the

olden days champions as staunch and sincere as the historian finds among the unflinching " divine right " advocates. To such rash champions it was clear as the noon-day sun that the top-notch fighter had a " divine right " (hence a legal right) to win the lawsuit.

The doctrine on which the wager of battle rested would not have lived to the ripe old age it did attain were it not sunk deep into quite a few honest hearts and consciences, yet it is scarcely irreverent today to class the absurdity in the ash-heap of blank nonsense or worse. To think of it is to smile, were it not at once so tragic and so cruelly unjust. On the one hand a man's life, liberty, reputation and property, his dearest possessions, were solemnly filched from him, on the other hand a man went unwhipt of justice, before grave courts in the sacred name of justice in broad daylight by such a travesty called a trial. And this grotesque buffoonery was abolished in 1819 only.

The case in criminal appeal of Ashford v. Thornton (1818), 1 B. & Ald. 405, is of interest as containing exhaustive arguments on the right and limitation of the right to trial by "battle," embracing a historical sketch of the origin of this precious kind of trial through the Norman conquest and the instances in different cases in which the right was either ousted or allowed. As will be noted from that crucial judgment, the courts of that rude age did not hesitate to swallow whole the stern precept that he who sets the law in motion must martyr-like be "ready and willing if required to stake his life" on the issue. It appears further that Ellenborough, C.J., like the others had not the least doubt that the general law of the land was in favor of the wager of battle, hence that the court's duty was to pronounce the law as it stood and not as the court thought or might think it ought to stand. In other words this grotesque wager of battle was in that immortal case dogmatically pronounced to

be the usual and constitutional mode of trial, although there would providentially have been " ouster of battle " if allowing " battle " meant merely the giving to a sinister man the power to fight where he must fight " for fighting sake alone."

It is to be deduced from the sober argument here afforded us that the classes of case to which the right of wager of battle was incident were tried in this pugilistic fashion in order " to leave God to whom all things are open, to give the verdict in such case, scilicet, by attributing the victory or vanquishment to the one party or the other as it pleaseth Him." Yet in this connection there is grim humor in the reflection that the " battle " law was a dead letter if the opposite party was under fourteen or over seventy years of age or a clergyman or a woman or crippled, the power of the Almighty being limited in the eye of the law according to each fighter's fitness for physical combat.

Before leaving the old fancy that God would interpose to decide the issue of a

lawsuit by turning the balance for or against a party to the cause depending upon that party's physical vigor, we may drop the Norman heritage of wager of battle and take up the ancient Saxon spirit whose "great judgment" was by that gentle and bland mode of trial known to us as the "ordeal." The gracious "ordeal" protrudes in criminal cases under four heads (a) camp-fighting (b) fire (c) hot-water (d) cold-water. See Hallam's Middle Ages.

A suitor's life, liberty or property depended in those days, as we all know, too often on tests of this ilk which to the twentieth century lawyer seems too absurd and too wicked and too cruel to be true. Think unmoved of deciding a lawsuit depending upon whether (a) the plaintiff's body or (b) the body of the accused should float or sink when judicially pitched into the river! Again, take the cold-water "ordeal," where a party, whose legal rights were pending for trial, was judicially cast into the stream and

declared " in the right " if he sank to the bottom but " in the wrong " if he could float being then " of the water rejected " and kept up! How about Salt Lake, Utah, and its buoyancy?

Which of those good old systems consists with common sense? Who on bench or bar would call them back?

Those ancient modes of trial are here resurrected and discussed to marshal them grouped with other early methods of balancing the scales of justice, as distinct from the conduct of a trial in a modern lawsuit.

And as the profession well know there were other ingenious contrivances to torture suitors without which the more critical medieval trial could not fittingly be conducted, such as " the strong and hard pain." This refined torture (classically couched in the term " *peine forte et dure* ") was obligingly applied to the prisoner indicted for felony if he " stood

mute." He was remanded to prison, courteously given a separate room, gently forced nude on his back to the floor his body modestly covered by an enormous weight of iron and from day to day slowly starved, tantalized by tiny morsels of rank bread and putrid water, till he (a) *conscientiously* confessed all the truth or (b) gave up the ghost.

In comparing and contrasting the old mode of trial, generally speaking, with the modern lawsuit, a convenient dividing line is found in the Victorian era, taking particularly the Judicature Act 1873 sequent to the Common Law Procedure Act 1852, which in turn was the outcome of the great law commissions which began in the thirties of the nineteenth century their first effective work to devise simpler, less expensive and wiser modes of trial.

In considering the phases of the modern trial, counsel are occasionally anxious to avoid its publicity. And this anxiety has brought rather sharp contests anent

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the right to trial in camera. At common law a trial must be held in a public court with open doors. For exceptions to this rule or for the law as recently declared in England, see Scott v. Scott, [1913] A. C. 417. In that case the vital principle of publicity is brought out in the following from Hallam:

"Civil liberty in this kingdom has two direct guarantees (a) the open administration of justice according to known laws truly interpreted and fair constructions of evidence and (b) the right of parliament, without let or interruption, to inquire into and obtain redress of public grievances. Of these, the first is by far the more indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

Again quoting from the same case:

"The three seeming exceptions which are acknowledged to the application of

the rule prescribing the publicity of courts of justice are (a) in suits affecting wards (b) in lunacy proceedings (c) in those cases where secrecy (as in trade-secret trials) is of the essence of the cause."

A recent Ontario case, Reid v. Aull, 5 O. W. N. 964, enunciates the doctrine of publicity in these words: "It is to be remembered that here, as in England, the law is administered publicly and openly, and its administration is at once subject to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our courts forms one of the excellences of our practice of the law, and, in the words of Lord Fitzgerald, in Macdougall v. Knight (1889), 14 App. Cas. 194, admits of exception only in rare cases of such a character that public morality requires that the proceedings should be in camera in whole or in part."

Further quoting from Reid v. Aull: "In criminal trials in Canada, the right to exclude the public conferred upon the trial judge by section 645 of the Code is restricted to cases in which the court considers the exclusion to be in the interest of public morals. Other exceptions occur in the case of wards of court, in lunacy proceedings, and in actions regarding secret processes, where the paramount object of securing that justice be done would be doubtful if not impossible of attainment if the hearing were not in camera."

The common law principle is laid down in Daubney v. Cooper (1829), 10 B. & C. 237, by the Court of King's Bench as follows: "We are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public."

Canadian and provincial statutes now cover all exceptions quite clearly.

The theory urged by some trial judges that the old ecclesiastical courts were secret is exploded by the Scott case.

Aside from such questions as when the trial may be in camera and when it must be public and who are the chief actors in the conduct of the trial, acute forensic skill must variously determine how to try an issue (a) on contract (b) in tort (c) for a crime. How was a trial conducted prior to the Judicature Act (a) in a chancery court (b) in a common law court? How is the trial of a cause conducted in the fused courts operating under the Judicature Act?

Again, who begins and who closes; what evidence is admissible and what excluded?

Again, how far does the onus of proof rest on the plaintiff and on the defendant respectively?

What cases are for a jury and which for the judge alone?

What functions are properly exercised by (a) judge (b) jury (c) counsel?

Is the trial mainly a search for the truth?

Are the plaintiff's rights roughly speaking the defendant's duties?

What relation does *form* of action bear to *substance* of the cause itself?

In view of such questions what historical significance marks the Judicature Act?

It has well been said that a trial under the old system presupposed a versatile knowledge of the injuries cognizable on the one hand by the courts of common law and on the other hand by courts of equity. The trial of the modern lawsuit is better understood and more efficiently conducted by the lawyer who familiarizes himself with the leading principles, rules, fictions, forms of the old system, although he avails himself of the formless action, the fused law and equity, bestowed by the Judicature Act.

And the conduct of the trial cannot be mentally divorced from the origin of the cause, nor from the aim of the judgment and execution, nor from the perils of appeal. The goal is in full view from start to finish and every one of the steps designated as orderly parts of the action has more or less bearing from time to time upon the effective conduct of the trial itself.

Can counsel avoid slips in the contest in court who overlooks any of the principal incidents of the action as a whole which have been well classified under the general heads of (a) writ (b) pleadings (c) issue (d) trial (e) judgment (f) appeal?

In his conduct of the trial proper then the thoughtful lawyer bears in mind each of these steps as incidents on his important journey from the injury to his client as a starting point to the concrete remedy to that client by way of judgment and execution as a goal.

Trial then is the examination of the matters of fact in issue, finding out the truth. The conduct of the trial must depend upon the nature of the facts about which the truth is sought. The principle governing in all cases calls for the best method of trial and the best evidence upon that trial which the nature of the case affords and no other. Yet how well any experienced trial lawyer knows that his own peculiar tact and skill have much to do with the application of such fundamental principles of procedure, and how vital may be his act or omission at any stage of the contest.

A few homely hints from a trial lawyer whose luck as a case-winner was a household word covered the following ground: "Never go into court without brief of facts brief of law and brief of rules. Know them intimately. When possible prepare your own briefs, try your own cases, do your own pleading. The verdict crowns him who sees his case, not through

a knot-hole, but of himself from all sides. Reflect with Bentham that the most egregious of liars speaks the truth 999 in every 1,000 utterances. Throughout the trial bear in mind that it means simply to get at the truth."

All said and done, the case-winning counsel is essentially the medium of the truth. The closer he hugs this line the greater his success. His tact and skill must cover facts, rules and law, perhaps important in the order stated.

CHAPTER 3.

THE JUDGE: HIS FUNCTIONS.

The judge is said by a great jurist to be no more than the mouth that pronounces the words of the law, a mere passive being, incapable in one sense of moderating either its force or vigor.

Laws are necessary relations arising from the nature of things. In this sense all beings have their laws: the Deity his laws, the material world its laws, the beasts their laws, man his laws.

While the tyrant wants few laws, the lover of liberty wants fixed laws.

Law is human reason. Side by side with all laws are the folk rules or maxims without which laws are idle and barren: (a) nobleness in our virtues (b) frankness in our morals (c) politeness in our behavior.

Very often the trouble, expense, delays and even the very dangers of our judicial proceedings are but the price that each citizen pays for liberty. For liberty is merely the right to do whatever the laws permit. True liberty is where the judicial power is distinct from the law-making and the executive powers.

In the modern lawsuit, the judge is the central character. His personality is of prime concern. He it is who holding the scales of justice paves the way to what is the real purpose of the suit, the bringing out of the truth. Sitting as he does to administer justice according to law he defines by rule the functions of all including jury and counsel.

The magistrate, from one viewpoint, is as essential to civilized life as the parent or the tutor. Life is less real, less protected, less account generally, where any of the three exemplars is wanting. His few words aptly contain a great deal of "useful and curious sense," by a "habit

of silence" he comes to give "just and sententious" dicta, since "loose and incontinent talkers seldom originate many sensible words," nor do they "reach the point nor arrest the attention."

It is no wonder Lycurgus, the great Spartan law-giver, held up family government as the true model. "He who knows how to speak, knows also when."

Although the wise judge may foresee his decision early in the trial, then is silence golden. The privilege of pressing the crucial points of the case is jealously prized by the litigant and his counsel: none perceives all this more clearly than the man who holds the scales of justice. A premature dictum is often misconstrued, while the judgment (with its reasons in due course) is presumed to be right.

The ideal judge is blind yet ever watchful, neutral yet fighting each side, indifferent to results yet with the right, evenly holding the scales.

The original dominion granted to man by the Supreme Grantor may not plainly have imported the law-maker or the judge of our civilized life, yet it is well argued that we are today more nearly than ever solving how man may best administer his huge estate comprising the earth and its all. The rights of man are nowhere more justly and equitably recognized and conserved than in our courts of justice, wherein the majesty of the law is aptly personified by the wise judge.

Of old, the strongest man often seized the crown. The king often seized the bench. He too often made the laws and administered and enforced them. He too often defined all rights and dispensed all justice. He had no fixed terms of court. He held it where when and how he chose. Too often the king was trial judge, jury, court of appeal; all rolled up in one.

Our government is in changed times. The theory of our constitutional realm is for a trinity of functions: making law for

law-makers, applying for judges, enforcing law for executive. These functions are blended yet distinct, independent yet complemental, each class a potent prop of the state while one missing all must suffer.

Under our system of government we are singularly fortunate in our judiciary. The normal type of judge is capable and honest. He is above purchase, above reproach, above fear. None more readily than he realizes that "the courts have nothing to do with the wisdom or policy of an Act of parliament." None more readily than he realizes that "the future of our jurisprudence lies largely on the knees of the legislature and while fictions have played their part and judge-made laws have played their part, to statute laws belongs the future." In other words the normal judge is a faithful and honest exponent of the people as he finds their will propounded in their statutes and there is no just cause to complain with

the present trend of the judiciary in this respect.

The principles of the law-maker are more or less flexible to suit different law districts and their diversity of climate and soil and industrial engagements and religious views, so the judge who construes and applies our laws well knows how distinct they necessarily are at many points from those of a less liberty-loving people or from those of a nation widely unlike our own as to soil, climate, industry, art, literature, religion. The fundamental knowledge of our skilled law-maker in this respect cannot be a sealed book to the judge.

What the Spartan law-giver Lycurgus, or his Athenian brother Solon, contributed in the shape of laws for the peculiar conditions of the primitive Greek, well exemplifies the consensus of mankind that laws are not only rules of action prescribed for the citizens of the state but also, if apt and wise, such laws must be

devised and fitted to the particular race for which they are prescribed.

In days gone by there was many a temptation for judges to make laws. And the wonder is, not that the bench in its honest attempt to do right so operated as to make numerous laws, but rather one marvels how skilfully the bench avoided making many more laws than it did make.

Take the history of the former court of chancery. How strongly tempted must not the honest judge have been to add a law here, or a rule there, in order to save the honest litigant from palpable injustice or ruin! When that litigant was "right in law and wrong in equity" and the dismissal of his suit, with all it involved, could not (under the cast-iron forms of action known to English jurisprudence well up to the Judicature Act 1873) be avoided, what a helpless and hopeless pang of torture must have pierced the pitying judicial heart! When the "originating summons" was a thing

unheard-of and even a clause of a will could not be construed without a cumbrous, costly, tedious, ruinous administration of the entire estate, with what a sad heart must not the sensible and honest judge have been constrained to withhold the ready remedy lodged in his mind and conscience!

When the common law action, like the equity suit, could not under the then entrenched though absurd rules of evidence bring out the truth from the lips of perhaps the only persons who knew anything about the issue involved, with what a sorrowful heart must not the judge have excluded all testimony which could be reasonably expected to serve the real purpose of the trial, the discovery of the truth; with what disgust would he shut out the parties and their relations!

In a criminal trial, what must have been the chagrin of the fair and impartial court, which might rationally have determined the guilt or innocence of the

accused by admitting him to the witness-box, when the right to grant this privilege was stolidly denied at law!

In the whirligig of time we find the origin of the different judicial jurisdictions evolve gradually into our well-developed system as it exists today. From the modest justice of the peace to the tribunal for the trial of the highest concerns of life and property, the different judges with their respective functions are traceable from very early beginnings.

What the great Hebrew law-giver under divine guidance devised and propounded seems admirably to have served the needs of a primitive people. What could have better fitted the then conditions and wants of the chosen people than the orderly divisions of the courts to be presided over respectively by Moses himself and by the other judges grading from him down! There seems a peculiar fitness in such an arrangement of law districts and such an investiture of

judicial power as are found in that dispensation.

In modern times we find such arrangements as that of Peru under which fairly similar provisions (after allowing for the span of thousands of years) disclose themselves. And while their operation may present different results, they are well worth noting.

Again, in England itself we find the early development of her jurisprudence under which like divisions weave themselves into the administration of justice.

The philosophy throughout is, holding the scales of justice through the family then tens and hundreds and larger divisions and that the smaller the law district, generally speaking, the better the chance to get at the truth and hence to the justice of the case.

Prior to the important period between the Common Law Procedure Act 1852 and the Judicature Act 1873, the court of chancery and the three great common law

courts of King's Bench of Common Pleas and of Exchequer helped to swell a long list which formerly included (a) Admiralty (b) Ecclesiastical (c) Palatinate, and many others.

While the judges of those diverse courts all worked for one identical goal, to find out the truth and render justice, their qualifications and methods were decidedly diverse. There was too grim a humor in some of a judge's most solemn performances while hearing and determining issues of vital importance. For instance the verdict of guilty or not guilty which depended, not on any of the tests of twentieth century jurisprudence, but on whether the accused or his accuser was knocked out in the prize fight, gives one by contrast a hopeful conception of the modern lawsuit, and of the onward march and upward trend of the modern judge.

An ancient court contest, wherein the issue was decided on the buoyancy of the defendant's body cast on the water, bears

sad contrast with the scientific inquiry into the truth, which a modern judge may now preside over according to law and surely without violence to common sense.

Poor human nature too often expects the ideal. While generally our judges are ideal, some are not. The unhappy exception sometimes faces suitor and counsel. How to win a just cause before the ideal judge is simple. The reverse of the medal saddens the honest heart.

After all, the world of judges are met and dealt with on their merits. much as we meet and deal with other neighbors. Faults are overcome by mutual dignity and firmness. The few weak and erring ones fall of their own weight in the face of strong truth and unflinching honor. The unfit judge does the less harm, the more fit and valiant suitor and counsel prove to be. Fight his errors, but bow to ethics yourself. Don't let the menace of the judge's power vulgarize your own

methods or manners. Remember the integrity of our bench is admittedly high; remember that every well-poised judge aspires to a record for fair and impartial decisions; remember the good citizen upholds the judge on the presumption of integrity. The judge is a corner-stone of our governmental system. Be true to it.

Happy the nation like ours whose judges are justly distinguished for their mentality and their integrity. And even here the law of suggestion has its force. Convince each judge that he is pure to the eye and you make him a better judge.

Every instinct, each inspiration of a normal man argues for integrity and impartial conduct on the bench; the bad judge is distinctly abnormal.

Justice, precedent, reason, statutes, rules, ever being factors in the stormy vicissitudes of your case, the make-up of the judge is vital. Have an eye to that make-up from the beginning. To that end

the sagacious barrister animates the political, fraternal, civic, religious life of his country. Give of your best to make a strong county bar from whose fold comes your judge.

To every lawyer it is elementary ethics that the ermine is first in the court of which counsel is an officer. Don't spatter the ermine! If pelted with mud, cleanse it! If aspersed, succor it! Always defend it as our bulwark.

In defining the judge's functions, it has been said that law governs the bench, as facts govern the jury and rules govern counsel, that rules are the sceptre of the bench. If we interpret this as a fair glance at the respective beacons of bench jury and counsel, we cannot too strongly emphasize the obligation of the judge to apply the law as he finds it. And the law adjective, in the shape of rules, is in a sense the active part of the law. For without it, the wrong defined by the substantive law remains a dead letter and the

remedy to be applied is not then afforded by the adjective law.

The presiding officer, where justice is judicially administered, exercises functions of a wide scope. The judge, whose duties involve great responsibilities, arrives at the truth only by the observation analysis and deduction of a mind with the decks cleared for the action.

No case is so well tried and determined as when the judge, wise and philosophic, lives up to Conan Doyle's golden rule on mind-equipment. Doyle says: "You see, I consider a man's brain originally is like a little empty attic, and you have to stock it with such furniture as you choose. A fool takes in all the lumber of every sort that he comes across, so that the knowledge that might be useful to him gets crowded out, or at best is jumbled up with a lot of other things, so that he has a difficulty in laying his hands upon it. Now the skilful workman is very careful, indeed, as to what he takes into his

brain attic. He will have nothing but the tools which may help him in doing his work, but of those he has a large assortment, and all in the most perfect order. It is a mistake to think that that little room has elastic walls and can distend to any extent. Depend upon it, there comes a time when for every addition of knowledge you forget something that you knew before. It is of the highest importance, therefore, not to have useless facts elbowing out the useful ones."

At the risk of appearing desultory I have quoted Doyle. The point is this. The critical duty of the judge, as we well know, is the decision of a court on the question at issue in the action based on reason, on law. To reach that decision he directs and controls the most effective mode of getting at the truth known to poor weak mortals. The consensus of human wisdom and philosophy grants him liberal powers and wide discretion in the direction and control of the truth-extracting process. Based primarily on the

laws of the land he is afforded a code of rules "with power to add," in order to direct his mind logically to the matters at issue and to exclude everything extraneous.

The issue before the judge is tried and can only be tried subject to rules of practice to be interpreted and applied and even modified or waived by the judge. His discretion may at times seem even wider than is essential. Yet under closer inspection this latitude may be vital to the fair and impartial and reasonable and expeditious trial of the cause.

The best method by human ingenuity yet devised for deciding the rights and duties of man to man is in the form of a mental appeal to a judge, sometimes aided by a jury. Hence the mind so addressed must be so free from distraction that its best efforts shall for the trial be devoted solely to that trial.

What is so carefully safeguarded in relation to keeping a juror's mind free from

bias and irrelevant matter, to which so much common effort is dedicated, devolves very often with a singleness of burden on the broad shoulders of the judge alone. He is in the position because he has been weighed in the balance and deemed of fit mental calibre fairly and impartially and efficiently to hold the scales of justice between party and party.

The uncertainty of the lawsuit, which has been likened to that of the horse-race, is a standing gibe of the demagogue. That element of chance has been his pet sarcasm from time immemorial. Yet it has again and again been demonstrated that under the system of jurisprudence known to England the results have been in a fair percentage of cases according to the laws of the land. It must be borne in mind that in a great rich and free nation like England the laws are admittedly fitted to conditions and needs and aspirations not generally applicable to rude and arbitrary governments. *Their* law districts may

have simple and few laws: *ours* with their great variety of conditions and needs are fitted to complicated cases. The will or caprice of *their* despotic prince may constitute their code of laws: *ours* we make, the judges pronounce. It is true human imperfection in the legislature or on the bench leads to occasional statutory defects or absurd pronouncements, yet where these plainly appear to block the way to justice we do not hesitate to enact new declaratory statutes curing the mischief.

On the whole, the laws of England, compared with those of other great free nations, are reasonably clear and certain presenting but few inconsistencies. And after all a large percentage of the cases involving uncertainty hinge upon uncertainty as to the facts not the law in such causes.

The wonder is not, so much uncertainty, but rather so much certainty; not so much absurdity but rather so much sound common sense. The legal historian in a

comparatively brief backward span dwells, is forced to dwell, upon not a trial by way of appeal to the mind in our conception thereof, but rather to brute force. What then were the judge's functions? As an instance, wager of battle was of the military ages and superstitious frame of mind, an appeal to Providence, under an apprehension and hope, however presumptuous or unwarrantable, that heaven would give the victory to him in the right. The decision of suits by this appeal to the God of battles was of the warlike peoples from the earliest times. It was until comparatively modern times part of the law of England.

It takes no great stretch of the imagination to shudder for the fitness of the average twentieth century judge to preside over such a mode of trial.

Nor can we easily conceive a modern judge directing the "ordeal," or any of the ingenious tortures and barbarities known to the generations when "might

was right," when the physical prevailed over the mental.

The versatile functions of the judicial mind are brought out under such varied species of trial as (a) by record (b) by inspection (c) by certificate (d) by witnesses (e) by jury (f) by the court (g) by a referee as a delegate of the court. Although the first three classes of case are now unusual, they are still recognized modes of trial.

The judge who reaches the goal by inspection, the court seeing for itself, takes a role a long step from that equally essential trial by witnesses on the validity of a challenge to a juror, and equally distinct from a trial by certificate of court officers on its customs and practices.

The judge must exercise a nice discernment who consistently keeps the juror on his own side and the bench on its side of a somewhat flexible bar of division between the law for the judge and the facts for the jury.

It has, in this connection, been said that the constitution of the jury is admirably adapted and framed for the investigation of truth beyond any other method of trial in the world, yet its efficiency depends so much upon the tact and skill of the trial judge that a single blunder in the exercise of his functions may in itself constitute a mistrial.

In considering the functions of the bench, an eminent authority made interesting comparisons between the county judge as a local tribunal and assizes presided over by outside men. While it is not denied that in mental equipment the local judge and his commissioned brother may theoretically strike the same average standard, the dignity of the commissioned judge is more impressive.

The judges though varied and shifted at every assizes (a) are all sworn to the same laws (b) have had broadly speaking the same education (c) have pursued generally the same studies (d) converse

and consult with each other (e) preside in those courts which are mutually connected and their judgments blend together (f) they are interchangeably courts of appeal or advice to each other. Hence their administration of justice and conduct of trial are consonant and uniform; whereby that confusion and contrariety are avoided which would naturally arise from a variety of uncommunicating judges, or from any purely local establishment.

All said and done we are only doing in a twentieth century spirit what has down the ages of cruder procedure been essayed: hindering the wronged man from "taking the law in his own hands." No system can, nor is it wise that any system should, ever be devised which leaves none of the wrongs to be redressed by the "wronged man himself." Indeed the bulk of our wrongs must be adjusted "without suit."

"Because of the immense indemnity paid by the conquered at the close of the

war, the conqueror was flooded with a wealth that she had never known before": see Empire Club Speeches 1903-9 page 80. What does this mean? Simply (a) that the strong should not help the weak (b) that might is right (c) that law is for the weakling.

It means, in its logical outcome that when the treasury is low, a nation does *not* work and skimp to make ends meet: but that it arms to raid a weak neighbor and robber-like takes by force what it is too lazy to earn by hard work. Carry this warlike spirit into private life, and you have a glaring picture of what " civil life without law " means.

It is all " dazzling in the extreme," but does it work well where either nation or individual chooses to enter the outlaw class; or is the law, fairly and impartially administered, the bulwark of liberty? The functions of the judge are sacred and his seat is fortified by justice and liberty.

CHAPTER 4.

THE JURORS: THEIR SCOPE.

The scope and functions of the modern jury cannot well be defined without a long look back into the misty pages of forensic history. The origin of trial by jury is safely carried back where "memory runneth not to the contrary."

It seems a well-supported opinion, among several opinions variously advanced, that the jury system had its origin in the practice of suitors consenting that their actions should be tried by a jurata or jury, in preference to the trial by duel, the jury being a number of persons summoned to inquire on oath into a question of fact pending in a judicial inquiry.

The juror as a member of the jury therefore becomes in a limited sense a judge and as such hears the evidence to

elicit the truth on the issue as to the facts. His functions are in some respects independent of the court, in others absolutely subject thereto.

The relation of judge and jury is fairly indicated by what has been said concerning the respective functions of each to the effect that "law governs the judge, facts govern the jury and rules govern counsel."

The judge, while far from being fettered as to facts, has a wide scope as to rules and alone pronounces the law, being thus fully vested with the right and bound in duty to instruct and direct both jury and counsel concerning their functions throughout the trial.

Of interest in this connection is the generally accepted definition of one of the modes of trial which prevailed until only a few generations ago under the caption of trial by "wager of law," a proceeding which consisted of a defendant discharging himself from the claim, on his own

oath, bringing with him, at the same time, into court, eleven of his neighbors (compurgators) to swear that they believed his denial to be true. This quaint mode of trial existed in England as we know until the reign of William 4th.

And some legal historians have, to their own satisfaction, confidently traced the modern jury from this ancient privilege under which a party to a suit could win on a finding in his favor by eleven of his neighbors whose testimony, coupled with his own, constituted the oaths of the requisite twelve in all.

In clearing up the haze of forensic history in respect of the primitive trial by jury and its conception, we are forced to glance at the most remote divisions of the people into law districts great and small, considering them from the single family to tens of families and hundreds of families and counties and provinces. This is more effectively done by touching the high spots in the law and procedure

of ruder peoples of different lands. Indeed mosaic law and its practice, fairly familiar to every well-informed lawyer, present an inviting starting point in relation to how and by what laws and folk-rules the chosen people were governed, how in those days law was administered in divisions running from a single family up to a nation.

The composite people known to us as England is only of course understood by the forensic historian who traces back to the various roots. The influence exerted on law and procedure by the Dane, by the Anglo-Saxon, by the Norman respectively must be gauged by him who would understand how and why we to-day enjoy the great boon of trial by jury. Just how much we owe to the Norman and how much to the Anglo-Saxon and what to Dane is a most interesting and clarifying study. Certain it is that the jury system as we know it today came to us step by step down through the ages and, by what-

ever names designated, the rude and primitive peoples of many centuries ago had their jury systems.

The ancient jury seems to have exercised its functions under oath but rather as witnesses of the truth on the issue between the parties than as judges of fact based on evidence of others.

As we have the system today, the finding on the facts by a jury far from being opposed by the judge is really welcomed by him, relieving him to that extent from a responsibility which is already a heavy one especially in trials involving the highest concerns of life and property. And among the time-worn instructions of judge to jury none is more clearly defined or more emphatically pronounced than the exclusive and absolute right of the jury (subject of course to the law to be taken from the judge) to determine and find the facts in the case.

Touching different methods of trial for the finding of the facts without the judge

himself determining them, we might refer in passing to the ancient "wager of battle," a species of trial introduced into England, among the Norman customs, by William the Conqueror, in which the person accused fought with his accuser, under the apprehension that God would give the victory to him who was in the right.

Again we have the old "camp fight," the trial of a cause by duel or combat of two champions in the field, for decision of some controversy.

Perhaps it is not straining logic to urge that each of those quaint modes of trial had at least some bearing on the development of our jury system as we enjoy it in the present age. Each in its turn lifted part of the burden from the judge's shoulders and tended eventually to give us the more scientific methods of the modern judge-instructed jury.

It goes without saying that the elector, selector, commissioner, maker of a jury is

a factor worth gauging. Like the judge-maker, he wields an arm of magic silent potency. The men whose voice makes a judge ought not to covet the latter's office or power: the popular will brings forth the jury. How a juror is chosen for the panel is as well known as the process of judge-making. Prudent counsel and wise citizens mark well the course of such vital events. Jury-makers are conceived and born of the two political parties, by turns, for fair play. The jury system is dearly prized and jealously guarded by the populace of the law district. This is wise.

Be such a citizen then that you have a potential share in making jury as well as judge: it's the beginning of political wisdom: it opens to every worthy citizen who makes good in life to exert at least some salutary influence in this respect. To do so is not only a right but a duty. For the jury is in plain words the county's judge of the facts: the county tries the facts through its representatives, the jurors.

Under the primitive practice the whole populace of the law district were theoretically brought together to decide the facts from their own personal knowledge; then the law district delegated that duty to twelve of their worthy residents who in the same way decided the facts on their own personal knowledge. That kind of jury was not cautioned against allowing its own knowledge of the facts to interfere with its decisions: on the contrary such was the sum total as a basis for its findings. In other words jurors got at the truth in olden days as neighbors of the litigants personally acquainted with them and their disputes. Again, the jurors were themselves the witnesses and as such judicially decided the facts in issue.

It is not then any marvel that an eminent jurist lays it down that the juror ever belongs to the law district in which the trial is held and ever is in touch with the habits, customs, trades and sports of the district and is the better juror when he

knows intimately from childhood those local affairs, a familiar knowledge of which is so essential to the intelligent trial of the various characteristic causes of the particular law district. In reference to the advantage of the jurors who try the facts being neighbors, while primitive conditions would have it so, there is much reason and benefit in our modern system which keeps it so.

The suitor has, in the jury system, a bulwark of fair play; and this largely because the juror tries the case as a peer, as a neighbor and fellow-citizen of the law district.

The litigant and his counsel find the juror, thus local, a rare prize second perhaps only to a just cause. This is not implying anything against the integrity and fitness of the juror, but rather inviting attention to the fact that both suitor and his counsel know each juror's characteristics better perhaps than even their own. Every Tom, Dick and Harry on the panel

is a vivid picture for years back; the juror's politics, race, creed, habits, trade-methods, old lawsuits, his character and reputation from the cradle, are an open book, his fads, prejudices, frailties, preferences are all on the surface.

History exposes the open systematic sale, in a certain great European nation, of judgeships at so much a seat. Our bench cannot be scaled by the ladder of gold. Moreover our jurors are the priceless bone and sinew of the country. Keep up the moral and mental standard of the county from whose fold the juror comes, and the jury system is safe. Keep public sentiment right.

The modern jury system rests on statutes and moreover is safely installed by the vigilance and jealous care of the people as a whole, yet it is absorbing to analyze and compare the customs and practices of our forefathers from which emanated this unspeakably great bulwark of our liberties, our lives and properties.

And while every citizen, and especially every litigant, should highly appreciate the boon of the jury system, the juror himself must surely esteem it not only a privilege but an honor to exercise as he may his best faculties in harmony with the judge that the truth may be reached and justice under the law may be meted out through a mode of trial in which the juror is in a sense another judge. The privilege is so clear and the interest of the public so vital that the Judicature Commission incorporated in its report a special recommendation that laws exempting the juror from acting as such should be "limited to persons whose avocations render them undesirable as jurors, or whose duties are of such a character, and would be so far interrupted by their service on juries, as to occasion practical detriment to the public."

A system such as this, as has been well said, "clothes every eligible citizen with a kind of magisterial office, makes all feel

that they have duties to fulfil toward society and that they take a part in its government, forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness, which is, as it were, the rust of the community."

It is undoubtedly true that the system "imbues the minds of the people with a part of the qualities and character of the judge, spreads among all classes a wholesome respect for the decisions of the law."

Where each man in judging his neighbor feels that he in turn may likewise be judged, the result naturally is an increase of manliness and virtue on all sides.

The functions exercised by the jury are those of a judicial institution based upon social and political necessity. The facts are for the jury. It has the clear right to hear and determine the case to that extent subject of course to the law as laid down by the judge and bound to the limits of the evidence which the court admits as proper

for consideration. And no jury can safely or properly, generally speaking, exercise its functions as such, unless under the guidance and direction of the judge as to the law and the evidence.

To try the issues of fact between the parties without fear or favor is clearly the duty of every jury.

The jurors first of all must have been duly selected as eligible for a place on the jury panel ordinarily for the term of court at which the trial is to take place.

Again each juror before the opening of the trial proper must be found to be eligible to hear and determine the facts of the particular case in question.

The care of the patriot has been and is clearly to define the dividing line between the province of the judge and that of the jury. While it is unwise to shake the independence of the judge in pronouncing the law and in enforcing the rules laid down and even in emergencies framing

new rules; on the other hand it is clear that the value and effect of the evidence admitted by the judge are for the jury to determine, it properly decides what credit belongs to a witness, it balances up and arrives at results from conflicting probabilities. Fairly considered it is gratifying to find how seldom relatively judges overstep the mark and how frankly they concede that to the jury belong the facts on the evidence and law of the case. Disappointed suitors perhaps too often criticize and complain about the bars between judge and jurors being ruthlessly torn down by the judge. Defeat in a cause makes the loser rather critical. Yet all said and done, the jury pretty generally lets the judge alone while he directs upon and enforces the law and the rules, and the judge pretty generally lets the jury alone while it weighs and adjusts the probabilities on the evidence let in by the court.

The jurors are, in assessing damages and compensation, generally clothed with

a quasi-judicial power. In like manner they are in effect exercising judicial power in finding a defendant "guilty" or "not guilty" of an alleged offence.

Again the general verdict in damage actions may in some circumstances touch the line dividing the provinces of judge and jury and much controversy in appeal arises as to the jury's scope in this respect. When the jury is too strictly tied down to answering special questions submitted by the judge, there without doubt is great danger of staying the fair fearless and independent trial of the facts by the jury. This danger has been the theme of counsel on appeal so often that the very light and logic thus brought to bear on the rights and duties of jurors have done much to preserve the jury system in its independence.

Without this system every man could not have his due nor be protected in life and property: with the system there is too often miscarriage of justice. It is,

however, clear as noon-day that the greatest protection of our liberty is in the right of trial by jury. It is equally clear that the people highly cherish and shall forever defend this great bulwark against oppression.

Again the jury must be advised by counsel for plaintiff or prosecution of the nature of the issue of fact to be submitted.

Again it must hear the evidence of the party on whom the burden of proof rests.

Again it must hear the nature of the defence.

Again it must hear the evidence in support of the defence.

The summing up by counsel on either side is for the jury also.

The judge's charge, as to the law in the case and as to the precise issues of fact and what evidence he admits, is vitally important for the jury's consideration, constituting as it does a corner-stone for the verdict itself.

After all this the jury retires to the jury-room and upon due deliberation finds its verdict, being its opinion on the questions of fact in the judicial proceeding.

The common law rights and customs, the established practice, and the modern statutes, upon whose composite foundation the jury system is builded, open an engrossing field of interest to those who would know why all good men and true as a unit stand for trial by jury. The system may have its defects yet so long as liberty lives the jury will stand.

CHAPTER 5.

THE COUNSEL: THEIR DUTIES.

Counsel with brief arises of course from client seeking advice or committing his cause to counsel's management whether in prosecuting the claim or defending the suit. Simply this: counsel (since honorarium days) contracts to perform certain professional duties for the client. This counsel learned in the law undertakes then to argue the client's case in court, as popularly put. His functions are but baldly stated unless we cover many duties beyond the bare argument.

Besides brief of facts and brief of law it is the part of the prudent counsel to make brief of rules. It is said rules of practice win more cases, defeat, or nonsuit, or strike out, more actions, than does substantive law or evidence. Most wavering lawyers fall by the wayside on rules.

The cautious counsel will early study, dissect, master, each rule to be invoked for or against his client. *It* he will penetrate with microscopic keenness, knowing it (and it is legion) as he would know his master. It cometh without warning to trip counsel and his cause. It is indeed the sceptre of the bench. Law without rules is an engine without a governor. They are the open sesame to fat verdicts and ready judgments. Divorce the rule, the law deserts.

The counsel goes to court in deadly earnest: to win. He adopts every device, uses every talent, fires every engine, to *honorably* gain his goal. Character, genius, work, are the gateway to success.

Counsel is the sphinx entrusted with the client's secrets. Their safekeeping is not his least-important task. The forensic race may depend on this.

The wise counsel advises the court of any statutes, decisions or rules on which his case may hinge.

The lawyer's functions are indeed varied. He cannot be said to execute them if his client fail owing to any omission of duty on the counsel's part. The contract is to win the case if honest work and reasonable skill ought to carry success: any result short of success in such a case is fairly to be laid at the counsel's door.

Perhaps the most trying part of counsel's duty is to draw or otherwise assure himself of a good and sufficient pleading. This is not necessarily on all fours with other pleadings in similar cases: there are, as one well knows, reasons to give distinctive and personal touches to our particular case. The essential points must find a haven within the safe pleading, yet there may be good grounds for emphasis that cannot be found in any model and the genius of counsel takes care of this.

The opening of a case by counsel may make or kill. Nothing is harder to uproot

than a good or a bad impression planted in the judge's or juror's mind by the opening. The birdseye view afforded by the opening should in many a case fall far short of a slavish synopsis even, of what follows. Infinite tact is needed here. Some cases have features standing for but one apologetic allusion to those features; to repeat such is far from wisdom.

A good opening then is a fair start on the road to success.

Again, the examination of witnesses is only properly conducted as a general rule when the gist of every piece of evidence is arranged in counsel's mind as he draws what he needs from the witness. Far from tremulously awaiting the witness' answers, he should in the main know what is to come. This does not mean he should have tampered with the witness in advance. It is on clear principles of logic the counsel's duty in advance to know of what knowledge the witness is possessed and in advance also to know, assuming a

frank and honest witness, precisely the purport of each material point to be covered by such testimony.

It has been well said that the thriving lawyer never suborns a witness, never calls for false testimony, never slights the sanctity of an oath. To belittle its sanctions is to quarrel with a potent weapon of the law and to incur the penalty of professional outlawry from the right-thinking judge and jury without whose social touch all is lost.

Counsel must enlist his client in the cause of truth and justice. For the wise litigant upholds his lawyer by setting a pace for truth. His poise should inspire counsel: his every utterance, every statement of his witnesses should be true. This is the goal and the only aim leading to success for the trial lawyer. A lawyer of integrity wins his suit against the lower type: the successful lawyer cannot afford to suborn witnesses in any case however shaky. His own future is at stake.

Client and counsel square, justice scales swing truer verdicts.

While government has three functionaries (law-makers, law appliers, law enforcers) the counsel is in each case a medium of the law which he would ask the judge to apply. The judge, who has nothing to do with making the law or with its wisdom or policy, applies it to your case if you convince him that it must be so applied. This then presents one of the more serious functions of a capable advocate. Such an advocate bears in mind that the modern lawsuit stands or falls on the laws as already enacted, not on any new judge-made law; he knows that we are enjoying a new system of jurisprudence based more and more day by day on statute-made laws and correspondingly less on judge-made laws.

The function of counsel under which he submits the law fitting his particular case cannot be given too great emphasis.

Although justice, precedent, reason, statute, rule, *all* count much in the stormy

vicissitudes of the trial, yet the counsel who would win must never neglect in advance to brief the *law* he would have the court to apply to *his* case. The conduct of the trial is lame indeed, erratic and vacillating, unless counsel is clear as a bell on his law. This means, not that the court will be misled by counsel, but rather that it is a basic function of each lawyer to know and to present his law on his own theory of the case. This is done in spite of diversity of opinion between court and counsel on the law. Yet without slighting the judge or unseemly contention against his interpretation of the law.

To every lawyer, it is elementary ethics that the ermine is first in the court of which counsel is an officer. Don't spatter the ermine. If pelted with mud cleanse it. If aspersed succor it, always defend it as our bulwark.

The law you want the bench to apply to your case, you have a right to present. Duty and interest dictate this. If it be

true that the judge is unconsciously affected by the medium enunciating the law, if counsel's painstaking observation and analysis are a convenient aid, you may well lead the court through the mazes of your cause, bringing out the potent logic of your theory. Get the tribunal wide awake to your faith, absorbing as it is, in the case now passing through the legal grist.

It is no discredit to the judge that you have a firm grasp on the law and the theory of your own case with which you have dined, worked, toyed quite a spell. To him it is a new chapter; to you a special work upon which you have been pounding untiringly, a supreme effort with heavy loss or dazzling gain at stake.

The judge wants your theory, your law: tell him, modestly yet distinctly, briefly yet plainly, what it's all about, why you're in court. Take him into your confidence. Inspire him in your most modest mien with the consciousness that

he naturally knows less about *your* case than you know. Bear in mind that, as life is mortal and court costs so much a minute, time is precious for court machinery and concise directness is golden.

Prove first last and always with gentle insistence that you understand that case of *yours* (just as you know your own library) better than any other soul on earth.

A judge having learned your theory and law, expects the balance by way of evidence. Let him see (let the whole cast of characters, friend and foe, booster and critic, see) that you anticipate every rule as it serenely bobs up at the trial.

A wily counsel who won a heavy percentage of his cases, alone and unaided at the trial, is quoted as advising a brother advocate thus: "You have generally speaking no more need for associate counsel than a dog has for a second tail: associate counsel too often prevents easy action on your part, the clashing and

jarring associate counsel vainly essaying with you to present the one side of the one case for the one client in harmony of theory, practice, evidence. If the associate *must* advocate your client's cause, step out yourself: if you are staunch and fit, retire the man who covets your glory or fee. If love or diplomacy or debate, do you call an assistant; then why injure your cause by an associate counsel in a lawsuit?"

Rules of practice must be right on top, at your tongue-tip. Be ready. It will be to no purpose to find the rule tomorrow. Now or never. You catch the ball on the fly and send it home.

The top-heavy law-lore man cuts a sorry figure by rushing into the trial-arena without his key to success, the rules. They are the vital trial-tools. Write them out in longhand, learn them by heart, resolve them into their elements, with them permeate your mental being. In your training den, apply each rule to every

case, so that none may surprise you into chagrin or defeat.

Remember the crown of success is not to the sleepy. A reserve of argument at trial never counts: nail your point where it belongs in the thick of the forensic battlefield, not next day.

As the successful lawyer desires an upright and strong bench, he well knows that the judicial weakness which may win him a bad case today may lose him a good one tomorrow. Errors at the trial may upset your plans for success: the court may depreciate you and your cause. So, if you fight uphill because the bench misconstrues and resists, don't lose heart. Ford the stream. Bear in mind: truth is mighty and will prevail. And ever too that the extraction of the truth is the purpose of the trial drama.

If you see errors, make your record for appeal: your victory there will be the sweeter.

Don't lose temper or dignity: try your case calmly. Be respectful: maintain your self-respect. Above all, let no surface turbulence lower you in the popular eye.

Remember strife begets strife. Don't turn your lawsuits into bitter bickerings, bad-blood duels.

Bench and bar may either incite or soften poor battling money-seeking humanity. A word turns the fighters to fury or to tears. Bench and bar are well equipped to teach the Fatherhood of God and brotherhood of man. In the battle of the forum wage fire and sword: never accept peace without honor. Yet ever respond to that benignant touch of nature which makes the whole world kin.

Given a hostile court, checkmate him. Be as steel, yet velvet. Smiles not frowns win hearts. The people gauge it all: they love the plucky fighter as they admire the cheerful loser. And after all you

yourself may be partly in the wrong. Fight as the light is given you.

Let the lawyer who chafes under court rules and court resistance indulge a little wholesome introspection. Perhaps the advocate may see two sides to the shield.

An advocate's responsibility to keep his client in his place is a strict duty: he will find no better means to that end than his own consistent respect to the court and constant conformity to court rules. This never, however, implies the vulgarity of cringing or truckling: no monetary goal can buy the counsel's self-respect.

It is well to contrast the duties of counsel in the modern lawsuit with those devolving upon him a century or even fifty years ago. It is not so long since the right of counsel to appear was very strictly limited. The law reports are well stocked with cases in which the litigant begged in vain to be represented by counsel.

The counsel's duties in a less liberal age were so circumscribed by cast-iron rules

that some of the most enlightened advocates of a century ago would turn in their graves at the latitude accorded the modern lawyer in his conduct of his case.

In this era of statute-made laws in which judge-made laws cut less figure from term to term, the lawyer's functions are in many respects wide as the poles from those of his ancient prototype. Again, a trial by wager or by ordeal obviously called for a type of lawyer distinctly different, both in mental equipment and forensic methods, from our modern advocate. As we find even rules specially founded upon the clearest of statutes today, there is but little excuse for the modern lawyer knowing less of them than the judicial conscience.

Indeed it has well been said that bluster is being gradually crowded out of the submerged tenth of both bench and bar, according as the science of the law and lawmaking has become more exact and more logical.

The lawyer best performs his duty who keeps his client out of court whenever consistent with that client's best interests. The great majority of disputes are wisely and honorably and economically settled without issuing writs at all.

The sanctions of folk-lore and folk-conscience suffice to bring angry contestants to wise compromises under the guidance of well-poised legal advisers. The Fatherhood of God and brotherhood of man, invoked judiciously by opposing counsel, will in a large percentage of knotty contentions bring the disputants to amicable compromises. Counsel whc bring about such results, without litigation, are not only wise men but also competent and popular legal advisers.

The client who (through a skilful legal diplomat) rights his wrong, recovers his claim, restores his property or reputation, without washing dirty linen in public, thanks his lawyer twice: first for winning and again for keeping him clean.

The big fees are paid for skilful, clean, speedy passage from the sink of business perplexity across and up to a fair hearing and adjustment of honest claims and contentions. The desired goal is the effective settlement without the delay and parade of trial.

Keeping the foregoing in view the lawyer's first duty is to get results without suit when possible. His undoubted function, when suit *is* essential, is to fight to the last ditch and by every means short of dishonor to win the case.

CHAPTER 6.

THE PARTIES: THEIR RIGHTS.

A client seeking his lawyer's advice or committing a cause to counsel, may know very little about his rights. Indeed parties to lawsuits in most cases are proverbially ignorant of their rights. Of course they know in a general way that they are approaching the fountain of justice. They feel as a rule that a wrong is to be redressed, a right to be established, a dispute at law to be determined. Beyond these elementary concepts even the shrewdest business or professional mind in most cases fails to penetrate.

The substantive law governing the litigant's case is too often a sealed book to his mind. Blackstone's sound advice that every man of property and every man of business and every man of liberal education should be fairly grounded in the rudiments of the laws of

his country seems generally speaking to have fallen on ears that would not hear. For today as in the tedious past the number of learned or illiterate who are students at law are limited practically to the profession of the law.

The litigant stands or falls on the combined effect of substantive and adjective law. Although the right he wishes to enforce or the wrong he seeks to redress is that predicated by substantive law, he can get nowhere unless his advocate aptly forces the adjective law by way of rules of procedure. To the litigant all those rules are clouded in mystery, so that he pays the retainer for counsel perhaps not so much learned in the law substantive as ready in its practice, or in other words steeped in the law adjective.

The litigant may or may not possess exact notions as to the laws of his country, but it is safe to assume his blissful ignorance of the rules of practice.

The modern lawsuit is plain sailing contrasted with the ancient action at law or suit in equity. The strictness and absurdity in some respects of the ancient lawsuit or equity suit are staggering beyond belief to the average layman and indeed to many a lawyer of this twentieth century.

A single century back, the litigant was confronted with two great fountains of justice, the common law and the equity courts, which instead of working to a common end by common means were proverbially jealous and antagonistic *inter se.*

Perhaps no decree in equity was more emphatically heralded than that although the litigant was right at law he was all wrong in equity. Why or how this was resolved by the profound equity court was ever a mystery beyond the poor reversed litigant's ken; and truth to tell not seldom above his lawyer's perception;

and even too deep for the common law bench; and now and then not very well supported by the court of equity itself.

The suitor in days of old knew mighty little about forms of action, although they were thick as leaves in Vallombrosa: he was hopelessly ignorant of the precise number of involved truths and fictions essential to an orthodox bill in chancery: he knew little indeed about whether his case was in trespass or trover or detinue: he could scarcely say whether he belonged in equity or King's Bench or Common Pleas or the Exchequer.

The rights of the parties in the modern lawsuit are so radically different from the rights of floundering suitors of early in the nineteenth century that we naturally seek the cause. Was it due to radical changes in the substantive law or to an overturning and sweeping reform in law practice?

While it cannot be denied that the litigant's rights under the substantive are

radically changed, while to steal a shilling or a sheep is no longer a capital offence, while an honest debtor can no longer merely for his insolvency be deprived of his personal liberty for his natural life; yet the gist of the diametrical change of the suitor's status is to be sought in practice reform.

The old system was to mystify the honest litigant and keep the ways of the law above his understanding. The new system, evolving from the great law commissions of 1829, 1831, and 1851, and culminating in the Common Law Procedure Act 1852, and the Judicature Act 1873, cut out much of the delay and cost and red tape and muddiness of the old English procedure and gave us that logical fusion of law and equity which common sense and common justice demanded. Too the old verbose forms of action, in all their grotesque absurdity, were blotted out forever. The language of today, concise and direct, was admitted, while the bombastic

fictions and senseless verbiage of antiquity were banished forever.

No longer is the litigant who succeeds after a fair trial robbed of his judgment and execution by the brusque decree that he is right at law but wrong in equity.

No longer does the patient litigant weep to see his common law judgment restrained by an equity decree because he sought justice in the wrong court room.

No longer is the litigant generally speaking at a loss to find his proper court or at needless expense and *travel* to reach it. Although right here is to be noted a rising public sentiment to confine *appeal as well as trial* processes within an easy radius of every litigant's home and business.

His rights now generally speaking are with tolerable clearness and brevity prescribed by statute; thus being defined by his proxies duly chosen to make the laws. Less and less now depends on the judge-

made law: more and more on the statute-made law.

Entering the forensic arena by the wrong gate is no longer fatal to his cause; he may suffer a rational fine, but he is not thrown out of court for the misstep.

The Judicature Act enables the average counsel to launch his client safely: the pleading is in ordinary everyday language; the supertechnical form of action is gone as a discarded relic of barbarism.

The rights of the litigant depend much on the substantive law but more on the adjective law.

The honest and the innocent meet less technicality and law costs less.

No longer is the suitor's prize-fighting capacity of any weight at the trial; no longer do his rights hinge on whether his body floats or sinks in the adjacent pond; no longer does it matter whether he can endure the rack or suffer the fire without a quiver. All these rude tests of his rights are of the past.

His rights in the modern lawsuit are to ascertain the truth of the issue by the best mental process known to mankind.

He states his side of the case, his opponent his with the opposing claim, the issue is for hearing and determination.

The issue depends upon the truth as brought forth from the witnesses on either side. The litigant has what persons he wills to testify and may himself testify in the modern lawsuit. This seems too obvious a right to affirm it. Yet it is only of very modern origin. What were the litigant's rights in this respect a century ago? The modern lawyer, and particularly the modern litigant, marvels much to reflect that until recently the parties to a lawsuit were not to testify in their own cases, that their husbands and wives were excluded from the witness-box. The ages gone by were filled with dread lest those who knew most about the truth of the issue at a trial should swear falsely, hence that rule of exclusion. How

many thousands of suitors lost their property and lives by such a rule, it is perhaps idle to speculate today. How morals change with the times is well illustrated when we today review the frantic efforts of part of the bench and bar, a few decades ago, to perpetuate the rule of exclusion in question. The downfall of the honest administration of justice was in sight to those obstructors of any such reform. Where can one now find a judge or lawyer who would venture to exclude the parties as witnesses in their own cause?

The litigant can have the testimony of Jew or Gentile today. The right is so natural and reasonable that we marvel at the large number of honest witnesses whose evidence could not be had, unless they took oath in a cast-iron form contrary to their religious scruples. Now all such witnesses are available under reasonable sanctions without violating their honest scruples.

The suitor knowing his rights and duties, knowing their basis to be the rules

of conduct fixed as laws, is deeply concerned to know what is the machinery of law which is to grind out remedies and penalties. It is of doubtful practical benefit to be entitled to a legal right unless we can enjoy that right by enforcement. That enforcement must not entail too great cost nor delay nor worry nor humiliation. And perhaps as many suitors forego their just and legal rights to avoid red tape and officialdom as to save cost or economize time.

The party to a lawsuit should first of all know himself. He cannot be a useful member of society unless he fixes rules of conduct and of thought to govern his everyday life. The influence of personal rules of conduct has much more weight in settling legal disputes between man and man than law or procedure in courts of justice. The jurists who have dug deeply are a unit on this phase of personal rights and how to enforce them.

The dominion God bestowed upon man over the earth and its riches, " over every

living thing that moveth upon the earth," endowing him with an original absolute right to life liberty and happiness, is fit for each man's close analysis ere he seeks something from a neighbor. The status of man (independent of social contract) being that of unbounded independence, the burden of proof is of course upon *him* who seeks to disturb a neighbor in his presumed independence. Some social tie must be proved, some social contract must be proved, some rules of conduct must be proved, as a condition precedent to taking one jot or tittle from a neighbor, whether as to his life or property.

True, the state proclaims the laws governing our relationship to each other, yet the right to do this is, when closely analyzed, merely so much as we have mutually conceded.

The party to a legal dispute then is properly bound in the first place as a good citizen to employ reasonable means with a view to amicable adjustment of the

dispute before invoking the machinery of the law. The principles of honor and honesty guiding a normally upright life constitute the great lever for settlement of disputes between man and man, without which no well-governed country could continue well-governed.

The administration of justice by the courts is not at all intended for the hearing and determination of the countless disputes and differences arising daily among men of business. Such differences are in the main adjusted, and with eminent propriety adjusted, by the parties themselves.

Again, the thousands of disputes carried into the lawyer's office are in the main adjusted, and with considerable wisdom adjusted, without suit.

Hence, before suit the parties are properly bound in honor to take such steps as good conscience and the brotherhood of man dictate to allay all animosity and come to a friendly agreement.

However, having failed to agree, the court is the last resort and when the parties reach that stage they must know their *rights* if they would know their *duties inter se.*

Those rights are in the first instance defined by the law substantive just as the remedies and penalties are applied and imposed under the rules of procedure.

The parties having joined issue, as a result of pleadings setting forth the claim and the defence, are entitled to take part in the most nearly perfect debate known to mankind. The trial of a cause at law brings out an argument for a plaintiff or prosecutor met by an argument for a defendant, kept, by a trained judicial mind, within strict lines coterminous with the sworn evidence adduced by the parties themselves. That judicial mind, ideally and generally speaking in reality, holds the scales fairly between the contending parties, sees that the issue is definitely stated, sees that the evidence is properly

admitted, sees that the witnesses are fairly heard, sees that the arguments of counsel are within decent bounds, sees that the general rules of procedure are impartially applied and of course sees that the rights alleged are based on the laws of the country. In other words the judicial conscience bears the responsibility, and it may be said generally performs the duty, of defining the rights of the parties and of applying the proper remedies and of imposing the proper penalties in respect of whatever wrongs may have been suffered.

The rights of the parties are best defined where the court simplifies as the trained and logical mind best can simplify them: the remedies are best applied where the court applies them with the least practicable cost or delay or worry or humiliation to the suitor.

Each party has the right to bring out the truth which is really the prime purpose of the trial. It follows that each

party is bound to speak only the truth and has the right to the truth from his opponent.

The modern lawsuit entitles each party to call practically everybody who knows the truth about the dispute.

The judicial mind today wisely makes the procedure of the court as plain and simple and free from legal fictions and technicalities as practicable. An honest litigant of average intelligence finds his path less tortuous under the civilized procedure of the present age, shorn of trial by battle or ordeal or fire and water, shorn, too, of monstrous legal fictions and cruel technicalities. The careless suitor is punished for his slips but not robbed of his rights where he comes in the wrong door.

In short, law and its administration are commendably aiming to keep pace with the advances in other sciences and arts. Certainty is the goal.

An honest debtor is no longer imprisoned as a criminal nor is an honest suitor barbarously badgered to disgrace in the mazes of middle-age mysticism and oppression.

The rights of the parties are very different from what they were a century ago or less when (a) over two hundred crimes were capital (b) only the original parties could sue on a contract (c) no statutory code fixed the rights of seller and buyer of chattels (d) law and equity were administered in distinct and separate channels (e) limited companies were unknown (f) a debtor was imprisonable as a criminal for debt (g) the weak were at the mercy of the strong (h) the employee, the woman, the child, the weak-minded were poorly protected (i) religious non-conformity meant penalties (j) much depended on forms of action, little on rights and wrongs (k) the manners of some courts were bad, some judges brow-beating the suitors and jeering at their efforts

and censuring juries which honestly did their duty (l) the counsel sometimes bullied the witnesses and perverted what they said (m) the eliciting of the truth was not always the main aim of court and counsel (n) there was no omnipresent press exerting its potent influence (o) delay and cost and worry and ridicule crippled many an honest suitor (p) legal fictions and cruel technicalities sometimes took the place of substantial justice.

CHAPTER 7.

THE WITNESSES: THEIR INFLUENCE.

Given an issue duly fixed by the pleadings between the parties to a lawsuit, that issue set down for trial before a duly designated court of justice, the prime object of the trial is of course the bringing out of the truth. This is to be reached under a system of which the judicial mind is the middleman while the witnesses are the endmen. Nothing is accomplished except through legally admissible evidence and no such evidence enters the case until censored by the judge.

The evidence of the truth is to be had from the witnesses. It goes without saying that some *one* mind shall determine how the statements of witnesses shall be limited to the subject-matter of the cause. The judge has that responsibility. Without his sanction no evidence is generally speaking admissible.

The witnesses, subject to the foregoing, have a potent influence at the trial. Their testimony is to bring out the truth and the more conflicting that testimony the more exciting becomes the great drama in which human life and personal liberty and rights of property may be involved. The influence of the witness is so great that stern sanctions are imposed by the law to compel the truth.

Where a capital case hinges upon "yes" or "no" from a witness, it is clear his influence in the result is supreme, and perjury in such a case is properly restrained by supreme penalties. Where the witness sees his own or his friend's last dollar hinging on "yes" or "no," the temptation to hide the truth may arise and, without perjury pains and penalties, truth might not prevail. Indeed this risk, in olden days, so appalled the law-maker and the court that interest in the result excluded the very witnesses who best knew the facts of the case.

Experience has taught mankind that the parties to a lawsuit may safely be heard under oath and that neither the parties themselves nor their relatives can wisely or justly be excluded from the witness-box, however shaded by self-interest their testimony may at times appear.

And just as the classes of competent witnesses are increasing as civilization advances, so those stern types of real evidence, whose silent potency overwhelms, are also multiplied with marvellous fertility.

Finger-mark evidence, thanks to modern science and art, will play a potent part. In view of recent developments in the courts along these lines, the following from Attorney Puddinhead Wilson is of interest:

"If the court please: Every human being carries with him from his cradle to his grave certain physical marks which do not change their character and by which he always can be identified, and *that*

without shade of doubt or question. These marks are his signature, his physiological autograph so to speak, and this autograph cannot be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by wear and mutations of time. This signature is not his face, age can change that beyond recognition; it is not his hair, for that falls out; it is not his height, for duplicates of that exist; whereas this signature is each man's very own. There is no duplicate of it among the swarming populations of the globe. This autograph consists of the delicate lines or corrugations with which nature marks the inside of the hands and the soles of the feet."

Finger-marks then are incontestable, infallible. As real evidence they are irrebuttable, all-potent. The human heart, an incision of which results in death, is a thrilling and convincing exhibit. Yet even such a piece of real evidence ranks second to the never-erring finger-prints as known to the modern law suit.

In considering trial witnesses and their influence it cannot be denied that certain real evidence is more convincing, therefore more potent.

A century ago little practically was known of the dictaphone which now takes its sensational place to grind out the truth in the modern lawsuit. As we know this curious sound-transmitter is so small that the coat-pocket cozily carries it. While it can be secretly installed in a few cubic inches in any room, it silently does its work, leaving the speakers quite unconscious of the presence of this recording witness. Such a witness under skilful operation, is another potent factor in the modern lawsuit. Its influence can hardly be overstated: its possibilities in the trial of causes can scarcely be exaggerated. And new as it all seems we find that the French philosopher Bergerac away back in the year 1649, through his "Comic Trip to the Moon," painted in prophetic fancy just such curious contrivance as the phonograph. To quote him in part:

"As I opened the box I found within somewhat of metal almost like our clocks, full of I know not what little springs and imperceptible engines. It was a book indeed but a strange and wonderful book, that had neither leaves nor letters. In fine, it was a book made wholly for the ears and not the eyes. So that when anybody has a mind to read it, he winds up the machine with a great many little springs, and he turns the hands to the chapter he desires to hear, and straight from the mouth of man, or a musical instrument, proceed all the distinct and different sounds which the lunar grandees make use of for expressing their thoughts instead of language. When I since reflected on this miraculous invention I no longer wondered that the young men of that country were more knowing at 16 or 18 years old than the gray-beards of our climate; for knowing how to read as soon as speak, they are never without lectures, in their chambers, their walks, the town or travelling. They may have in

their pockets or at their girdle, thirty of these books where they but wind up a spring to hear a whole chapter, and so more if they have a mind to hear the book quite through; living and dead, who entertain you with living voices. This present employed me about an hour, and then hanging them to my ears like a pair of pendants I went to walking."

Much then that witnesses narrate can, some day soon, be infallibly told by the moving picture, the phonograph, the dictaphone. How the talking machine today supplements and improves upon the old methods is well illustrated at the modern seat of government, where the reporter takes a thousand words of a law-maker's speech, then goes to a gramophone (or talking machine) and dictates into it the thousand words, then turns this into a type-script from the gramophone, thence to the government printer.

Again, we learn that government records through the moving picture will be handed down to future generations.

All this, now familiar as everyday events, is already exerting its wondrous influence on the character and accuracy of court testimony. The witnesses and their influence cannot intelligently be considered and discussed without a glance at those illuminating inventions in their practical and far-reaching utility.

Those inventions, with proper safeguards, are destined to play a prominent part and to become indispensable factors in the modern lawsuit. With their aid, that evidence of the truth primarily sought in the trial of causes can in many a case be best elicited.

The witnesses in the flesh will continue to exert great influence, but the checks and aids to the *living* testimony must devolve with greater frequency from year to year upon the modern inventions to which passing reference is here made.

When we test the influence of the witness, we naturally test his credibility. Putting to one side the test of the interest

which that witness may have in coloring the truth, whether as a party to the issue or under other monetary persuasions, we have such tests as prejudice, fear, favor, partiality. Again, we have the test of probabilities in the circumstances of the case. Again, we have the test of memory which plays strange freaks with some perfectly honest witnesses. Again, we have such tests as pride or modesty. Again it may be antagonism arising between the witness and his examiner, or between the witness and an opposing witness. Again, a witness may be carried by popular clamor or his own mere fancy.

Yet all said and done, the influence of the witnesses may be predicated as one of the most potent factors of the trial. The opinion of the judge on the main question and that of the jury on the facts, depend mainly on the truth, in turn based upon the properly admitted statements of the witnesses. These statements then are the turning point in the generality of cases and cannot be too highly emphasized.

The issue is determined on the weight of evidence emanating from the witnesses and, however conflicting that evidence may be, it is to point out the truth in each case. The veracity of each witness is so desirable that every feasible means to ensure his truthful narration of the facts is brought to bear upon him. As already intimated there are many chances of inaccuracy of statement even where the witness is constitutionally well-meaning and honest. He may have a bad memory, he may have defective powers of observation, he may be incapable of analyzing the question, he may misunderstand it, he may give mere hearsay in the mistaken belief that he personally knows what he asserts. Again, he may be so hopelessly biassed that he perverts the facts on that account, or he may zealously pervert them from religious or political or social or family leaning. Again, he may pervert them from personal bias due to personal interest.

In a baser sense false evidence may creep in if the witness, corrupt, be suborned to commit perjury.

In any of those instances, his evidence may prove the turning point in the whole case; it may turn the scale. His weight may mean much in life or property, liberty or reputation. So it is that the witnesses and their influence are of the deepest concern to the parties in every lawsuit. If a witness refuse to testify when present, or should absent himself, and thereby cause a legal injury to a party to a suit, his conduct is actionable and subject to penalty. He is of course responsible in this respect for giving false evidence, whether this may be suppressing the truth or misstating the facts. To enforce the rights of litigants the court is empowered to compel the attendance of witnesses and likewise to require them to fully answer such questions as may be regularly propounded to them upon the issue of any case.

The court to this end is vested with summary jurisdiction to punish as contempt of court any improper refusal of witnesses to testify.

Further, the offence of perjury is severely penalized. The offence is often committed with impunity, because of the proverbial difficulty of convicting for this offence. But when found guilty, a witness is subject to severe penalty.

It goes without saying that in a case where a life hinges on the veracity of a witness, his own life should pay the penalty for deliberately taking that of the accused by perjury.

And other cases of grave import call for the severest penalty when the verdict hangs upon a witness who deliberately induces a wrong verdict by committing perjury.

The scope of the evidence in a modern lawsuit contrasts strikingly when we recall the long list of exclusions under the old system.

We find with astonishment that such persons as the following, no matter how intimately and exclusively seized of the facts in a case, could not be called as witnesses: (a) any person previously convicted of a crime (b) any person with a pecuniary interest in the case (c) any party to the suit (d) the wife or husband of any party to the suit (e) any person whose religious scruples barred taking an oath in prescribed form.

Along in the middle of the nineteenth century the bars were let down, and since then the parties are generally the chief witnesses, and all those who know the facts are generally speaking eagerly sought and competent and compellable witnesses.

The man accused of a crime was, under the old system, not a competent witness on his own behalf: he is competent though not compellable today.

Under the old system, the truth was arrived at, or attempted to be reached, by

tests of pugilistic skill or heroic tests of physical endurance under the rack or red-hot iron or other unthinkable torture, or by superstitious tests of floating or sinking in adjacent water ponds: today the test is mental. The truth is found by the jury upon the credit of the witnesses *pro* and *con* coupled with the real evidence and circumstances of the case.

In view of the foregoing, it is clear that a great grist of evidence, outside of the oral statements of witnesses at the trial, may supplement such oral statements. That grist has been divided and subdivided into many heads and subheads. A few of the main heads such as (a) judicial notice (b) presumptions (c) demonstrative evidence, afford a glance of a wide field not strictly embraced in the oral testimony of ordinary witnesses at the trial. The effect of oral testimony is often tempered, and sometimes entirely frustrated, by rules of procedure under such heads as here specified. And while at first blush

we may deem such rules subversive of justice, we find upon closer observation and analysis that they are essential to the effective administration of justice.

While the oral testimony may be unworthy of credit for one or more of the incidental reasons to which allusion has already been made, the evidence accruing under the heads last mentioned is on the whole more likely to be *safe and sound.*

Judicial notice is conservatively limited and can well be accepted in the hearing and determination of issues at law; the presumptions which have weight in the trial of causes are conceded in the main to be founded on good sense and sound discretion; while the real evidence is the safest possible foundation for conclusions of both law and facts.

As long as life has passions there will be lawsuits, and as long as witnesses have interests there will be conflicting testimony; but the modern system of taking the evidence contrasts most favorably with the

old system with its absurdities and barbarism.

The influence of the witnesses is always a potent factor at the trial, and the higher the moral tone of the community the stricter will be found the evidence of the witness in court.

CHAPTER 8.

THE LAW: ITS APPLICATION.

It is not difficult for the legal mind to apply the law to his case, when he has clear view covering (a) his facts and (b) his law. And however paradoxical it may sound counsel must seep himself with *all* the facts before he dare apply any law. In other words, the law and its application will be considered by the discreet counsel when (and only when) he has a clear conception of each and every fact material to the issue. It may be said these facts are in the breasts of laymen hardly able to appreciate their force and effect in the eye of the law. So be it. The first function of counsel is to extract from the layman all the facts of his case. The lost lawsuits but rarely go wrong from doubt as to the law: they are the outcome of slovenly briefing of the facts.

The issue is the fundamental quest of the successful lawyer: this he must decide for himself, and genius so to do is the mark of the case-winner.

It follows that the first principle of litigation is: "How to brief the facts."

So much emphasis on this function may be deemed out of place under the caption, "How to apply the law." Yet the logic of the call is convincing. A little patient inquiry at the outset gives counsel that full view of the facts without which he cannot brief them. Having turned on the X-ray with the sympathetic confidence of his client the advocate sees the issue as the court is to see it on the evidence at the trial.

Under the old system of jurisprudence the *form* was vital: the *substance* secondary. A man's form of worship made or marred him: his *merits* depended on that form. The Hebrew for instance was, until the Victorian era, debarred from his

rights because his form of oath was irregular. Until then the life and property rights were denied him on the stupid plea that his *form* of oath was nonconformist. And this is only one instance of such injustice on cruelly absurd grounds. For what applies to the Jew has applied in one fashion or another to practically every imaginable shade of religious and political sect just as often as it chanced to be down and out. And yet the conscience of man responded readily enough even in his day to the following sentiment from the stern Oliver Cromwell:

"The state in choosing men to serve it takes no notice of their opinions; if they be willing to serve it, that satisfies."

Still in his age and in every age on which legal history sheds its light, until the Victorian age, *form* supplanted *substance* in the law and its application. Hence the application of the law in a modern lawsuit is a benediction, where of old it too often was a curse.

It is incredible that, less than a century ago, the law was applied in favor of a man or to his utter ruin, simply and solely depending on his *form* of oath or of worship. The law then was applied according to the litigant's form of worship: today the court cares not a tinker's malediction whether the suitor be Jew or Gentile, provided his cause be just.

Thrice-armed *was* he whose religion and politics were not down and out in the centuries gone by: thrice-armed *is* the honest suitor in this golden age. The law is now applied with some show of equal rights to all with special privileges to none.

When we reflect upon the laws, or rules of conduct, which the social compact has evolved, we have after all much reason to thank our stars that we have given up some of the absolute individual rights granted to all, in exchange for the mutual ties and obligations which we have entered into for brotherly convenience.

While the laws, which at our joint instance and with our joint consent as laid down by the state, are not always so clear and well-arranged as might be desired, they are today a satisfactory advance upon the fast-fading past.

The rules of conduct which govern us all under the head of laws are, it has been well said, in their philosophic analysis but little more or less than a formal crystallizing of the sound and safe rules of conduct established in families and between neighbors in the everyday affairs of life. Moreover the simple rules so established are the only just and proper rules of conduct to be applied until the law must, as a last resort, be invoked. There is neither time nor occasion nor wisdom in looking up law or lawyer so long as any hope of adjustment between neighbor and neighbor be possible or at any rate probable.

The law then is in its plainest aspect, the rule of conduct prescribed by the state. It fixes the rights and obligations

of us all. It is applied in nine out of ten cases by the parties themselves in their own good sense and fairness of spirit, with the feeling and socialism of brothers and neighbors. The law is in nine out of ten cases once more, the Fatherhood of God and brotherhood of man. Hence many a man of affairs: "No lawsuit for me." Many an honest and honorable man has run his course remote from courts, settling his disputes great and small out of court.

The laws however are needed, and imperatively needed, for the conglomeration of disputes and differences arising from (a) rights invaded (b) wrongs inflicted. There are many indeed void of the moral sense which so often suffices without the intervention of the courts. This great unwashed class are the cause without which the courts would have but little to do indeed.

The laws are best found where codified plainly in well-arranged statutes. All

laws should be placed in this code, so that none can be overlooked or disputed. The fewer omissions from the code, the greater certainty of equal rights to all and special privileges to none. For instance (and this comes home to every good citizen) tax appeals will be rare indeed so soon as *all* taxable property is *publicly,* uniformly and scientifically assessed at its *full* value under clear code provisions.

The legal history of nations has proved the wisdom and justice of codifying the laws: not *some* of the laws, but *all* of the laws.

The laws are applied under rules of procedure laid down mainly through the judicial mind. The making of the laws themselves being the work of the people by their chosen representatives, the judges are in turn chosen (directly or indirectly) by the people for the purpose of applying those laws. This function calls for the highest legal and judicial mentality.

The application of the laws hinges on so many and so varied rules of practice and procedure, that only a long course as student and practitioner fits the mind for so high a judicial function.

In this connection a distinct step forward in Ontario is indicated by a 1913 order-in-council bringing into effect the rules of practice and procedure as prepared by a specially assigned justice of the Supreme Court under the provisions of the Judicature Act. This Act, now to be found as Chapter 56 of the 1914 revision, is a good index to the 1881 law reform in Ontario based upon the 1873 law reform in England. Here we may note, in chapter 56, a cherished asset in the rules of law prescribed by section 16 and following sections and in the rules of court the framing of which is authorized by section 109 and other sections under which authority from the law-maker such matters as may by the judges of the Supreme Court be "deemed expedient for the

better attaining the ends of justice and advancing the remedies of suitors " can be carried into effect, and covering as well certain customs and other statutes.

The judicial mind approaches the trial of a legal dispute involving the application of the law thereto, in theoretical ignorance of the wrangle from which such dispute has arisen.

Touching the high spots in the cause, the judge first learns the issue as developed by the pleadings. This issue it is the prime function of the judge to discover. Without a clear-cut issue it is scarcely to be expected that a clear-cut contest is on. The substance of the issue is the pivot on which everything turns. The substance of the claim is on the plaintiff, the substance of the defence on the defendant.

And here again arises the marked contrast between the ancient and the modern lawsuit. The very issue which is the first care and circumspection of the judge and

which theoretically is ascertained and fixed at the threshold of the great drama, the trial, may now in practice be amended at any stage of the contest and even after the forensic fight is virtually closed. This is of course subject to substantial, as distinct from technical or formal, justice being furthered and ensured by the required amendment. The old system under which the form supplanted the substance having become a relic of barbarism, the new system furthers justice by such amendments it may be at any stage of the trial or even subsequent proceedings.

The issue then under the old system was upon pleadings so technical that it was often a hopeless task to fix it at all. Hence many an honest suitor went without his day in court and was without the satisfactory basis upon which to wage any contest by way of trial. He might file a claim in a court of equity when his only recourse was in a court of law or *vice versa*. Today under the established fusion

of law and equity the way is made clear and easy.

Having the issue fixed the law will be applied under flexible and liberal rules of evidence.

The evidence by way of oral testimony is really only supplemental however to much other evidence under various heads such as (a) judicial notice (b) real evidence (c) presumptions, and so on.

The judge's functions in respect of those different heads are indeed complex in the extreme, and without the aid of the judicial mind no trial can be carried on. There are numberless conclusions of law and of fact which must be reached by the court without the aid of oral testimony, as any standard work on the law of evidence will show in voluminous detail. The many laws and facts of which the court constantly takes judicial notice would fill volumes every term of court: the same may be said as to presumptions of law and of fact. Again, there is constantly injected much of real evidence without

which cases cannot be heard and determined.

The laws of the land cannot of course be applied without the observance of those rules of procedure under which the activity of the judicial discretion is dominant. The trial judge then is necessarily and properly the great factor in the trial of each cause, and to him is delegated the power and the responsibility of applying the laws.

The law cannot be applied without such pleadings as may constitute a proper basis for the issue. Nor can it be applied without the enforcement and observance of such rules of evidence as may limit that evidence properly to the issue so fixed. Nor can it be applied without such conclusions of law and of fact as are properly based upon the issue and the evidence already passed upon by the judge. Nor can it be applied without a formal judgment based on the foregoing conclusions of law and of fact.

It is not the purpose of this treatise to deal circumstantially with the different requirements as to (a) pleadings (b) fixing the issue (c) adducing the evidence (d) summing up the case (e) the judge's charge (f) the verdict (g) the judgment. All of these are necessarily a beaten path to the case-winner, and these reflections are merely passing thoughts upon the law and its application.

Too often perhaps we carp at the trial judge, accusing him of dogmatism or technicality or narrowness of construction. Yet there must be certain arbitrary rules in the speed of trial, for the general good. Many facts as well as laws must be judicially noted and go at that; many facts as well as law must be promptly presumed and go at that; many conclusions of law and of fact must be reached without any oral testimony and go at that.

And while under our liberal modern system of jurisprudence, many pleadings may be amended wholesale; yet there are

many instances where the whole claim may be too vague or insubstantial to constitute a cause of action and it must straightway go to the wall.

We must ever keep in mind that while the trial of a legal cause is the most scientific debate known to mankind, the discussion cannot be allowed to open until a clear cause of action is apparent on the face of the pleadings. Until a cause of action is clearly alleged by him who invites the legal machinery to move, he cannot complain if thrown out of court. Until he sets up a dispute about which legal debate is permissible, he must clear the way. Until he alleges a legal right invaded or wrong inflicted, he has no license to take up the time of the court. The law being clearly prescribed in the code or the statutes or the standing decisions, it will be applied if the rules of procedure so permit. And this is pregnant of significance. For however pronounced the law substantive, however distinct the right of the suitor, his remedy

cannot be had without such adjective law as will enable the judge to apply the substantive law to his case. In other words, "a right without a remedy" is worse than no right at all.

In code jurisdictions the vastly major part of a practitioner's time and study must be devoted to the code of procedure. This is the code which sets the law in motion and greases the wheels of the legal machinery. It is truly the motive power. Without it the law is never applied.

Hardship or difficulty in applying the law is today met by apt statutes from the law-maker. The supremacy of the law-maker goes the length of killing a decision where it clogs justice.

Victoria's personal suggestion is said to have met a difficulty of this character and to have led to the famed McNaughten case (1843) 4 State Trials N. S. 847 giving at a single swoop a synopsis of *all* the law relating to insanity in criminal cases. What a law commission then did is today done by statute.

CHAPTER 9.

THE RULES: THEIR POTENCY.

The ideal law district is said to be that which boasts a code of its substantive laws and a code of procedure. These codes, under the Utopian ideals, cover all the laws and all the rules. Such codes are probably nowhere, except in Utopia, to be found: yet if attainable the application of the law by the judges and its practice by the advocates will reach a point close to perfection.

The code of procedure coming the most nearly to including *all* the rules of procedure is the aim of the modern law reformer, and though the varied disputes of human affairs may by their very variety preclude the possibility of covering all needed rules, we well know that much is today codified and open to the average practitioner which a century ago was supposed to have no honest abiding

place except in the silent breast of the judicial functionary who unlocked at will or even by mere caprice. In other words rules to further substantial justice, to cut out absurd technicalities, to bury beyond resurrection senseless legal fictions, have in this age of modern science and invention been evolved in code procedure for the benefit and humane treatment of suitors who for generations suffered wrongs without remedy, bearing the heavy burden simply because the law reformer either kept his silence or was suppressed if he hinted at a revolution in the venerable procedure to which so many grave scholars had so stupidly bent the knee.

It was the Victorian era which brought the reformation in the practice of the laws of England which earlier practitioners had failed to effect. An official acknowledgment of such law reform is succinctly inscribed in the Canada Supreme Court Reports volume 31 as already quoted in chapter 1 of this treatise.

The rules of law their pronouncement and application are, as has been said, a highly important function of the judge. His discretion in this respect is wide. When his convenience and the justice of the case clash, the latter has the right of way: yet the liberal powers vested in the court in enforcing rules are wisely left there.

The potency of the rules must be considered in connection with their primary aim, namely, the application of the law.

The law cannot of course be applied however clear and emphatic the rights are defined, nor can the governing rules be invoked, unless the suitor finds his law of procedure to fit the case. It was precisely the difficulty of finding such law of procedure (or perhaps often strictly speaking the absence of such law) that defeated countless just claims under the old system. Prior to the Victorian era, there was indeed sad need of full code of procedure and there then was a correlative

dearth of remedies for wrongs. The confusion of the law and the equity called loudly for *their* fusion; the avalanche of drastic technicalities called loudly for *their* abolition: the laughable legal fictions called loudly for serious common sense: the oceans of verbose pleadings drowned human intelligence and confounded the honest suitor. The law commissions of the Victorian era were but the reactionary outcome of ages of outrageous cost and delay, fiction and technicality, ignorance and denial of justice.

The age of advance in other paths of life proved itself an era of progress in the efficient part of the laws of England, their sensible application.

It is obvious that, as a judgment which cannot be realized upon is rather a burden than a substantial benefit, so it was rather idle to go through the form of prescribing rights in the substantive law without an appropriate code of procedure to enforce those rights.

Under the old system it was but slight satisfaction to an injured suitor to know he was wronged, unless he also knew his remedy. The old system was, often, to lock up in the judicial breast much of the knowledge of remedial law and merely give the suitor a glance of it while throwing him out of court on some ridiculous technicality or fiction. Such a system might impress the honest litigant with the majesty of the law, but surely not with its wisdom or justice.

It therefore fell to the great law reform movement of the nineteenth century to sweep away fictions and forms and technicalities, to turn confusion of the law and the equity into their sensible fusion, in a word to apply the laws of the land speedily and at a minimum cost to restore the rights and cure the wrongs of honest and long-suffering suitors.

The complex trial of the old system having happily given place to the modern lawsuit so direct and to the point, the laws

are now wisely and effectively applied generally speaking. This of course does not mean that we have reached that approach to perfection of procedure where a lawsuit is or may be prosecuted with the directness of simple methods marking other concerns of the highest importance in life. Later we shall more closely approach that method of litigating our disputes which will appeal to the business man's conception of "less form more substance."

Even now there are many evidences of new light along those lines. In applying the laws of the land the rules of evidence have always been of vital importance and much of this evidence has helped or hindered the case under such heads as (a) judicial notice (b) presumptions of law (c) presumptions of fact. What might be presumed under the old system is far from what will be presumed today. Physically attaching a seal is for instance of much less moment today than even a few

years ago. Physically entering a parcel of land is less essential to its transfer today than a few years ago. Launching a suit in some stiff technical form is no longer necessary. Assignment of a *chose in action* is no longer contrary to law. Transfer by a married woman is liberalized. Recovery for a man's death in a personal injury case is no longer denied.

These, a few of many changes, are mentioned, from which it is readily seen that presumptions of law and of fact as of the old system are so overturned that the law is very differently applied in the modern lawsuit.

Again, we have oral testimony and its admissibility. The practice is revolutionized in the past century. As we all know, the parties who knew most about cases were generally speaking excluded from the witness-box under the old system; today the trial open to practically all witnesses gives us a radically different application, and a correspondingly different

influence, of the rules and laws. When neither the plaintiff nor the defendant could testify in a court of law, it was (if nobody else knew any of the facts) rather superhuman to apply the law wisely. When nobody having any monetary interest in the result could testify, it was a blind farce though *nominally* a trial of the issue where such excluded witnesses alone knew the facts. Where the facts were locked in the breast of some witness whose religious scruples forbade his taking some strict prescribed form of oath, it was obviously beyond human ken to discover the truth at the trial. Where the testimony was extorted by fire, the result strangely contrasts with that of a modern lawsuit.

In view of the legal history of the past century, in view of the law reforms of the nineteenth century, it is easy to see how differently, how much more wisely, we apply the laws of the land as civilization advances. With the broadening of the human mind, with the light of modern science and art, with the expansion of

popular education and thinking, with the march of democratic principles, the laws are applied with tolerable wisdom and philosophy.

The jury system is an old institution: yet the functions of the jury a century ago were indeed limited by contrast to its duties and powers today. It was, as we smilingly recall and blushingly confess, a sorry dozen of brow-beaten thinkers whose food and fuel and freedom were betimes arbitrarily cut off unless and until they stopped thinking and turned in a *satisfactory* verdict. The rights and duties of those representatives of the country are today so radically unlike what we historically know they were defined to be a century or even less ago, that the laws under their administration are now applied with an effect that would horrify an old system judge or counsel.

In the last analysis, it is not what the laws are, but who administers them. The best laws, badly applied, remedy no wrongs.

Under our modern practice, the laws are applied in happy contrast to court procedure of half a century ago, and the contrast is still greater in our favor by looking backward a hundred years. They are not so well applied today as they *will be* half a century hence.

Glancing back a century, we can scarcely speak well of laws or their application, when stealing a sheep incurred the same penalty as feloniously taking a human life, or when an honest insolvent suffered practically life imprisonment for his moneylessness. Neither the laws nor their application in that barbarous age (so glorious in some respects) can well inspire us with the reverence for their majesty which marks the good citizen of the present age.

A familiar example of law reform is found in the common sense and economy of time and money giving us the originating summons for the ready and reasonable decision of isolated points of law, without

cumbrous suits needlessly expanding into wide and costly fields which call for no litigation whatsoever.

A fair and frank review of the law reforms of the past century reaches the happy conclusion that bench and bar are trying to keep stride with the marvellous advances in other sciences and arts. This is encouraging. The day is not far when every right violated and every wrong inflicted will be judicially corrected, remedied, penalized (as the case may be) without serious encroachment upon the time or purse of the injured party, when it can less often be said that there is "a wrong without a remedy," when the profession of the law will operate the machinery of the law with democratic simplicity and twentieth century promptness.

The rules exert a potent influence under the modern system, because they are at once fairly liberal and fairly fixed. With a code of rules open to all alike the potency of those rules is to the end that the

issue shall be decided under a clearly prescribed system, yet with ample powers of amendment without which amendment substantial justice would be defeated.

In the modern lawsuit it is fully conceded that while rules of practice are for the convenience of the court as well as the rights of suitors, yet the suitor's cause is the paramount end to be served. Hence in the event of conflict, justice to the suitor is the governing principle upon which any rules of practice shall be applied by the court.

A careful writer on the potency of rules of practice has said:

"Rules admitting evidence are elastic. Some law districts insist that rules must run through the law-making crucible: others give courts blanket authority to make their own rules. Certain courts of appeal have laid down the following doctrines on the force and effect of rules:

"1. Each court is the best judge of its own rules.

2. A higher court will not reverse any construction given to rules by a lower court, not palpably erroneous.

3. A court may ignore its rules when a proper case is presented.

4. Rules are for the protection of suitors and the convenience of courts; but the latter is waived if justice so require.

5. Rules of court have not the effect of statutes.

6. Courts prefer rules enacted into laws rather than rules never ratified and passed upon by law-makers."

Under the caption of rules and their potency it is not amiss to consider the doubtful need and fairness of an appeal record costing a party to a suit the princely sum of $15,000. This instance of costly litigation, arising mainly under oppressive rules of practice, calls a halt in even the modern lawsuit. Given such an instance of big figures (exceptional though it be) the poor litigant may well pause before launching his writ. The

overwhelming effect of such rules may be less likely to obstruct the way to a judgment in a just cause where the parties are in cozy circumstances than among the humbler financiers. However that may be we are not yet in Utopia on the rules of procedure, we are still far from equal rights to all unless the man of small means is lent a helping hand in the trial of his disputes and differences with his more fortunate neighbor. And while much is to be done, much has been done, to give all litigants fair play and equal chances on the merits of their causes.

The foremost judges, the greatest lawyers, are and ought to be leading the popular revival to cut out cost, worry and delay in lawsuits by simplifying the potent rules of procedure.

A well-known jurist has aptly said: "A good proof of the supremacy of rules of law is afforded where the remedy for a wrong is transferred from the judge to the jury *thus* altering the substantive law itself."

CHAPTER 10.

Popular feeling: its force.

In one sense popular feeling is the supreme test. No law is strictly speaking enforceable unless backed by public sentiment. The feeling which constitutes a stable base on which to make the laws of the land must be a fairly *fixed* feeling, the result of second thought. It should, in the ideal sense, be broad and general enough to represent the public as a whole. Statesmen of the highest calibre often grope in hopeless darkness to read the public sentiment of the day, as many an appeal to the people has from time to time proved. An issue submitted for the voice of the people, under banners carried by two contesting political parties, is proverbially uncertain until the poll is taken.

It is said, "the vote is king and soon it may be cast where the voter chooses."

The *novelty* of the proposition alarms us: its *logic* is sound. However that may be the exercise of the right to vote is neither more nor less than the record of that public sentiment without which laws cannot be enforced.

The law-makers so chosen by the people represent in the last analysis the power to which all must bow. Before them (the people's proxies) all must bow, for their functions are supreme.

And whatever impression their importance to the eye must cast upon us all, that importance is really due to the voice of the people.

The modern lawsuit then would count for little indeed, if the force of popular feeling were not generally speaking back of all litigation. The power of the judge in engineering court machinery owes its dignity to the bulwark of popular feeling: the majesty of the law is born of the feeling of the folks who in the tens or hundreds or thousands or millions choose

their law-makers to frame and pass the laws. If those laws could workably be enacted and applied and enforced by the people as a visible whole, there is no sound reason for delegates to make the laws, for judges to apply them, or for executive to carry them out. But it is self-evident that such functions can only be well and wisely worked out by delegating them to duly chosen representatives.

Hence a lawsuit is based upon laws prescribed specifically by chosen law-makers and applied by chosen judges. Hence also the lawsuit, at many points directly and at many points indirectly, hinges upon popular feeling.

The popular sentiment which makes a law must stand firmly at the judge's side while he applies it and at the officer's back while he enforces it.

A century ago the courts afforded many striking examples of cruel and absurd applications of the law which the people in that age accepted, while popu-

lar feeling today refuses to stand sponsor for any such barbarisms. It is for instance only a few decades since the courts solemnly decreed to the husband the so-called common law right to beat and imprison the wife. The sentiment today is against it: so is the common law.

Again, the early notion of trial by jury was to try the facts of the case on the popular knowledge of those facts among the neighbors rather than on the evidence at the trial properly admitted under the direction of the judge: popular sentiment has changed.

The crude and cruel extraction of testimony by torture was backed by popular sentiment under the old system: not so in the present age.

The star chamber, the trial in camera, in all its stifling harshness and tyranny, was not it would appear so revolting under the old system: yet who would stand for it today? Popular feeling is

for the public court as the greatest conceivable guarantee of liberty and justice.

Popular feeling arose in opposition to the old common law principle which visited negligence with "no damages for personal injury resulting in *death*" although actionable if the injured party *survived*. Lord Campbell's Act in the middle of last century met the feeling of the people in this respect.

Popular feeling arose against capital punishment for the hundreds of minor crimes which were formerly punished with death, such as stealing small sums or even mere vagrancy.

Popular feeling revolted at last against life imprisonment or *any* imprisonment of the honest though moneyless debtor: the law was changed. Now even the insolvent may begin life anew and by honest industry acquire a competency. This was made possible by a healthy public sentiment.

Popular feeling sought clearer laws, more statute laws, less judge-made laws: and such strides are seen as the sale of goods code and other acts codifying laws of contract and of tort as well as criminal laws, some law districts ripe to publish all the laws in the daily papers free and open to all.

Popular feeling sought laws protecting the weak against the strong: they have come. Popular feeling arose against the brow-beating of jury suitor or witness: the procedure is changed accordingly. Public sentiment arose against the unspeakable inhumanity of man to man where the guilty one paid the price but his body was carved to pieces after nameless tortures which would disgrace even savages. Public sentiment rebelled against the murderer's execution where it signified that the body was a public spectacle in chains for the morbid and heartless to drink of such savagery.

The honest debtor may thank public sentiment that neither life imprisonment

nor *any* imprisonment is his fate for being moneyless. The jury may thank public sentiment that "locking up without meat, drink or fire" is no longer a condition precedent to a true and just verdict. The traitor formerly punished with hurdle, then hanged, then cut down alive, then bowels burned before his face, then head severed, then quartered (Townley's case (1746), 18 State Trials 350) may thank public sentiment for the mitigated penalty today imposed. The murderer and the pirate may in like manner thank public sentiment for softening penalties. The felon's family, too, may thank public sentiment that now the crime is expiated by the life or liberty and reputation of the guilty one without the forfeiture of his estate on which the family depend.

Popular feeling now stands for such principles as the following:

1. Rules requiring an appeal record costing a party to a suit hundreds sometimes thousands of dollars must go.

2. Statutes encouraging numerous appeals between the original trial and the court of last resort must go.

3. The suitor's remedy by trial whenever feasible must be of easy access in his own law district.

4. Cost, worry and delay in the working of the machinery of the law must be reduced to a fair and reasonable minimum.

5. The man without means must whereever practicable be given his "day in court" to prosecute a just claim or to defend against an unjust claim.

6. The administration of an estate in which a single question of law seeks solution shall not be clogged by costly and cumbrous litigation, where an originating summons can simply solve the trifling problem.

7. Let the law-maker tabulate all the laws into plain everyday statutes in this age of printers' ink: then with every law

an open page enforce it impartially and rationally and mercifully.

8. Codify, so far as practicable, all substantive laws and all laws and rules of practice and procedure.

Public sentiment runs along those lines and its influence is properly exerted in the direction indicated. The force of popular feeling in the main makes few mistakes: the bench in the main fairly interprets that sentiment.

The fundamental principles actuating the people as a whole are properly in the main the very principles which actuate the bench itself. When either deviates from those governing principles, the administration of justice to that extent becomes abortive.

The modern exponent of public sentiment is prominently the press. Is the press a factor in the modern lawsuit? Trying cases in newspapers seems from the very nature of a judicial trial a rather

perilous encroachment, and yet it is marvellous how much of good, and how little of obstruction, can be fairly charged up against that ubiquitous popular exponent, the press.

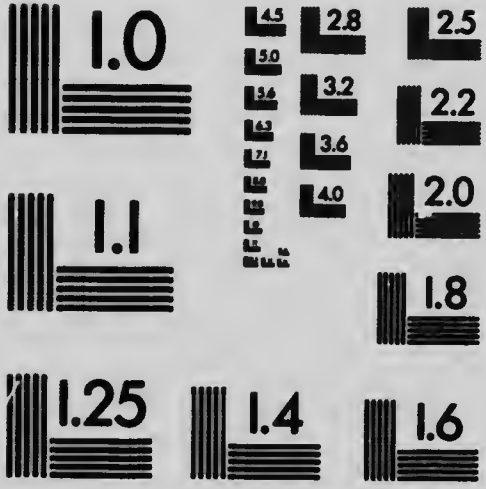
In early days the liberty of the press was outside the forensic arena; its rights and privileges, under which today it may so freely publish and take part in court procedure, being of gradual, inch by inch, growth and development. In pioneer times a judge would court impeachment ere recognizing the newspaper from the bench or off it. Times have changed. Today the press is a pillar of the people. Its voice is the people's voice: its freedom is the people's liberty: its motto is the square deal. Its activity at times may constitute an encroachment on the trial of causes, yet we think the following summary has much of truth to commend it: A crime is charged. The press becomes prosecutor or defence, as the people honestly lean. This is the greatest boon the

citizen enjoys. The publicity of the press is a trial of itself. No client, no lawyer, no juror, no judge, ignores the fourth estate: he cannot afford to belittle its part in court work. It throws the calcium light on the lurking criminal: we pass along in safety. It stands a stalwart tribune shielding the widow and the fatherless, turning scorn and lash against the vampire feeding from their scant substance. It heralds the cry, "the greatest good to the greatest number." No character at the trial is so great or dazzling that the press may not attack where public policy demands it.

The mission of the press is a noble one. The press as a whole is good. The liberty of the press is yours and mine: its license, its scandal-mongers, its blackmailers, its grafters, are or ought to be in numbers and influence of small account. The vile newspaper withers or ought to wither under public contempt and be buried without a tear.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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1653 East Main Street
Rochester, New York 14609 USA
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(716) 288 – 5989 – Fax

The modern law court welcomes and supports the good newspaper. Some of the most secret and atrocious crimes of our age have been bared and prosecuted and punished by the press. Freedom to print and publish the truth, from good motives and for justifiable ends: such is that liberty of the press which to some extent constitutes the people's liberty and as such the press is a modern bulwark of public order and good government.

From the foregoing it is a safe conclusion that in the trial of the modern lawsuit public opinion, as voiced by the sane and safe complement of the press, is a potent factor. With well-recognized limitations, the influence exerted in the trial of causes of action and prosecutions for crime is in the main wholesome and consistent with public policy. Emphasis is given to this point by an analysis of the admitted reasons against hearing causes *in camera*. As counsel well know practically all classes of case must be tried in

public. A few, very few, classes of case may be heard *in camera*: but these only lend emphasis to the generality of the rule that the courts must conduct their business in public. Public opinion is the power behind all trials: without that opinion and support the machinery of the courts would lie idle and useless. This is not to say, isolated cases may not be tried and their judgments enforced without the backing of an overwhelming public opinion. Yet in the last analysis it will be seen such cases are run through by normal well-organized machinery upheld broadly speaking by public sentiment.

The lapses of mobs who take the law in their own hands are not and cannot be defended or excused. They are at best passionate outbursts of ill-poised minds, too impatient and impetuous to leave the fair and impartial administration of the law to the calm and judicial conduct of their own properly constituted representatives and officers.

Such outbursts, tending as they do to anarchy, are a peril to all government, and constitute an encroachment upon the law and the courts and promote tyranny not justice. Ill-advised and vicious, license not liberty is the watchword, and such mobs steeped in blood are a crying peril to liberty and a brutal menace to fair play.

The power of the people over courts is never properly exercised by taking the law into the hands of a maddened mob.

On the other hand, broadly speaking, public feeling is exerted, wisely and properly exerted, in the choice of the lawmaker, in the choice (direct or indirect) of the judge, in the choice of the jury panel, in the choice of the other officers of the court. The public power may be more apparent in choosing jury panels than in selecting the judges, it may be easier to discern what public sentiment has had to do with selecting a sheriff or a court clerk or a court stenographer than

in selecting either judge or jury; still back of all elections and appointments of those indispensable factors for the trial of causes we find, widely considered, the one great force, public feeling. As has been well said, "the public will, directly or indirectly, appoints *all* public servants."

That the people's modern exponent, the press, upon principles of liberty not license, is at once a potent arm of government and prop of jurisprudence, cannot be denied. We have many instances wherein it protects the bread-winner.

Subjoined is a typical newspaper brief of the evidence in a horrible fire case showing what the press is constantly doing by way of wholesome publicity for the bread-winner:

"What fire survivors swore to at factory owners' trial:

In the trial of John Doe and Richard Roe, proprietors of the John Doe Company, for alleged manslaughter in having

been responsible for the death of Margaret Blank and many others in the John Doe building fire on March 25 last, witnesses called for the prosecution have testified:

1. That very few of the employees knew there was a door to the Washington place stairway from the factory.

2. That those who knew of it understood it was not to be used by the employees, who were required to pass a watchman at the Green Street door.

3. That on the occasion of the fire all attempts to open the Washington place door on the ninth floor failed until Louis Blank, the machinist, came to the assistance of the girls.

4. That the attempts of twenty-five of these girls to open this door convinced them that it was locked at the time of the fire.

5. That no fire drills were held in the John Doe factory, and that clippings were

allowed to accumulate on the floor until, on one occasion, a dealer removed 2252 pounds of refuse.

6. That the firemen who answered the alarm had to kick in the portions of the door that had been burned away before their arrival.

7. The prosecution also succeeded in offering in evidence the lock from the Washington place door on the ninth floor. Its bolt was still shot. The hand rail between the eighth and ninth floors was also offered in evidence. It stood three feet and nine inches from the doors, but had barely been scorched."

The unspeakable horrors of this fire and how they could have been avoided were of vital public interest. The press, as an adjunct to the court, by such activity, standing between the strong and the weak, renders a service of priceless value to the general public. Public feeling and its force are thus in the best feasible

fashion heralded in permanent form far beyond the territorial jurisdiction of the trial court in which this particular prosecution was being pressed.

Until of late no agency vied with the press as a news gatherer and news distributor.

The moving picture, swifter than the press, has a mighty mission. Its part in the trial of the modern lawsuit is likely to be big. Clasping into closer touch heaven and earth and man, it appeals to every eye, every mind, the adult, the child, the lettered and the unlettered. The moving picture portrays public opinion. The hour is near when added to press comment on court trial, its every detail will appear next day in the moving picture. Every vital character and each word he utters will be reproduced by joint picture and phonograph in our generation.

CHAPTER 11.

THE VERDICT: ITS EFFECT.

The opinion of the jury on a question of fact so often determines the issue of the trial that counsel cast the die on that. Yet experience teaches that while a sound verdict may be an all-sufficient basis for the coveted judgment, there are quite a few conditions precedent to a valid verdict.

The jury's inquiry on oath into the questions of fact pending in the judicial inquiry may or may not lead to an opinion which will constitute a safe and sound foundation stone for the judgment itself.

The jury system has so much to commend it and came to the suitor as a substitute for a system having so little to commend it, we are slow to acknowledge even the palpable defects which from generation to generation have marred it.

It has been upheld staunchly as a bulwark of justice for so long that one hesitates to apply the pruning knife, yet it is scarcely perfect in all its results.

The opinion which emerges from the consideration and deliberation of the jury room crystallized as it is into a verdict, the result of twelve men taking oath to hear and determine the issue between the parties upon the evidence and the law under the direction of the court, stands in the vast majority of cases as the good and valid verdict of the good men and true and constitutes a safe basis for the judgment of the court thereon.

Betimes however the trial judge cannot accept the verdict and may find the only proper course to enter a judgment to the contrary notwithstanding the opinion of the jury. The grounds which may compel the judge to reject the jury's opinion arise under several heads, and a whole treatise might well be devoted thereto.

All said and done however they classify roughly speaking under the two general heads incorporated in the jurors' oath namely the jury's failure (a) to find according to the evidence under the judge's direction (b) to accept and adopt the judge's pronouncement of the law.

In view of the foregoing, it will be seen that although the jury is vested with power to return a verdict specifically or in effect for either party to the suit, such verdict is wholly without effect unless the jury faithfully observes its oath to limit the evidence as directed by the judge and to give effect to the law as he also directs. Such direction is given under rules of procedure in the application of which the judge is vested with wide powers of discretion. Such being the case, a verdict not based on the law and the duly admitted evidence, can be summarily set aside by the judge and by that means rendered of no effect whatever.

Again, and here is a much wider class, a verdict may run the judicial gauntlet and meet with objection to its validity by the losing suitor. Here again the grounds of attack are roughly speaking the failure of the jury to render their verdict on the duly admitted evidence and the law, with the additional grounds germane thereto and so familiar to the trial counsel and especially to the appellate courts. Upon a motion against the verdict or findings of the jury and for a stay of judgment accordingly, the verdict is for the time being of course robbed of its effect.

The field for forensic debate opened by attacks upon the verdict of the jury is undoubtedly a dignified arena for legal fencing upon questions of law. And while the jury have only assumed to give a binding opinion on the facts involved in the issue of the case, there sometimes seems no limit to the number and variety of law points discussable on a motion to set aside that verdict.

Under the old system, it was not unusual to see verdicts set aside upon highly technical grounds, with scant regard for the substantial justice of the case. Modern practice however under explicit modern statutory provisions heeds the substance not the form and the verdict is not robbed of its effect where substantial justice permits it to stand.

A verdict under attack may stand the test under such conditions as the following:

(a) Where reasonable men might have so found although the trial judge may have held a different opinion.

(b) Where reasonable men might have so found although an appellate court may think the preponderance of the evidence is the other way, in the absence of error or some other substantial ground.

(c) Where the damages attacked as excessive do not exceed what twelve reasonable men might assess, if it does not appear that the trial judge's directions have

been disregarded or that a false measure of damages was applied.

(d) Where there was evidence to support the findings, although different findings might be reached on the whole evidence by an appellate court.

On the other hand, a verdict may be successfully attacked under such conditions as the following:

(a) Where the verdict was against the weight of evidence and on a reasonable view of the whole evidence could not properly be found.

(b) Where the alleged reason for the finding had no existence in fact.

(c) Where the trial judge's directions as to the law or the evidence are disregarded by the jury.

(d) Where the case was not fully developed for its proper decision.

(e) Where excessive damages are assessed the appellate court, under certain circumstances, may vary the verdict in

that respect instead of remitting the case for a new trial.

(f) Where there has been prejudicial error in conduct of, or interference with, the jury at the trial.

(g) Where there has been error in the instructions to the jury.

(h) Where the jury answering some, fails to answer other, material questions submitted to it.

(i) Where there has been prejudicial error in the judge's instructions.

(j) Where a view by the jury is made a basis for the verdict as infringing the strict obligation to find *on the evidence.*

Obviously the verdict is often without effect owing to want of strictness in the conduct of the jury or the empanelling of that body. There are so many strict requirements in respect of the constitution of the jury that a careful perusal of the Jury Act governing each law district is the most profitable guide as to the links

essential in the long chain of selecting and swearing and controlling the twelve good men and true whose power on the facts at issue is so vital to the suitors contending before that jury.

The wilful non-disclosure by a juror that in advance he has read all about the case and already made up his mind as to its merits, or such non-disclosure on any of the many other questions preliminary to his being accepted as a juror, may indeed render the whole proceedings nugatory and the verdict invalid.

In the olden days to give food or drink or fuel to the jury was often fatal to the verdict.

Of course under the more liberal rules of law and procedure of our present system, a verdict is not set aside generally speaking unless the substantial justice of the case is involved. Yet a verdict is without effect until passed upon by the court and although the vast majority of verdicts are held to be valid and accepted as

sufficient bases for corresponding judgments, their efficacy comes from the pronouncement of the trial judge in practically all cases. To him is given the right, upon him is imposed the duty, of formally passing upon and ratifying the verdict: without that formality it is practically of no effect whatsoever.

Of course his neglect or refusal to give effect to a verdict is appealable and the remedy is as a necessary consequence obtainable from the appellate court.

Under the old system, juries were not given that freedom of action afforded them under the modern system. Their honest verdicts were not always on all fours with the trial judges' views of the facts, and it was not at all unusual to find juries roundly lectured, because their opinions on the facts differed from the judicial opinions at the trials. The compulsive machinery of the court was so arbitrary in those days that juries were sometimes (as the Reports show) brow-

beaten and intimidated into returning verdicts, not according to their own convictions, but to square with the fiery judicial opinions on the facts.

Under the old system, there was no well-defined limit to the coercive methods at the judicial hand where a jury proved perverse and the over-zealous judge sometimes leapt the fence and usurped the jury functions to carry out his own honest convictions as to the facts.

The jury system meant less of protection to the suitor under such coercion than was ever intended, and with other reforms has come such reform in that system that the judge today is not only willing but anxious to leave entirely to the jury the hearing and determination of the facts. Indeed, no part of a trial judge's charge to the jury, in the present age, is more explicit than his assurance that the facts are entirely for the jury of which facts it is the sole judge.

In this connection of course the jury is enjoined that it must find upon the evidence, and solely upon the evidence, properly admissible under the judge's direction and that it must in like manner take the law of the case from the judge. This is manifestly as it should be and verdicts rendered under proper observance of such instructions are in the main effective.

CHAPTER 12.

THE JUDGMENT: ITS EFFECT.

The issue heard and determined, we have at the close of the trial the judicial opinion, constituting the judgment in the case. The effect of this judgment depends largely upon its *literal* finality, and indeed a full view of the literal finality of the judgment is a full view, in the main, of the effect of *such* judgment.

If the judgment is literally final, its finality constitutes the fruit for which all the seeding and cultivating take place. If the cost and worry and delay of the trial would invariably result in a judgment literally final, if the trial meant *all* the cost and delay, if it were the sum and substance of the fight, to be followed by judgment and its satisfaction, the lawsuit would present a very different face to the average suitor, But the truth is, a respectable class of cases are scarcely well

started when the trial judgments are rendered.

The trial judgment is sought by the plain everyday suitor as though it were the end of it all.

On the other hand the veteran litigant, hardened in the courts, only laughs at the first lap marked by the trial judgment. To him this is merely the *trial* judge's opinion to be pared and pruned, or varied, or reversed, in the tortuous pathway marking varied appellate court debates: to him the trial judgment is merely the first of a good half-dozen judgments by way of appeal through a long chain of appellate courts.

In this connection, nothing can more cruelly distress the veteran suitor (who counts his lawsuits by the score or by the hundreds) than cutting out a single one of the goodly list of courts of appeal. To this type of suitor, the jockeying in countless motions between the many appeals

is the meat in the cocoanut. The plain business or working man, who never invoked the aid of the court before, is of course mystified by it all. He enters to have a square deal and play a fair game in the issue, but is amazed to find that the judicial opinion, known as his trial judgment, merely marks the close of chapter number one, to be followed too often by a dozen sequent chapters, in which the trial judgment is by divided courts reversed, then affirmed, again reversed and again affirmed, perhaps later varied, and at long last restored. Running this costly technical gamut of drearily dragging appeals, wherein time is *not* of the essence, the plain bread-winner, victor after years of litigation, is cynical enough to think that "the winner is the loser" in time and money. He fights the forensic jockey, the trained court gladiator, the "chronic litigant," who keeps court machinery bristling with scores of such causes, carried by keen annually-retained counsel from term to term and from law district

to law district, seeking to fag and dishearten the "casual suitor."

Such is to some extent the practice on its darker side in even the modern lawsuit; but under the old system where *law* and *equity* had their distinct and separate courts and jurisdictions, the evils of cost and delay and legalized opacity were infinitely worse. In this contrast the following from Pugh v. Heath, 7 App. Cas. 237, is of interest: "The court is not now a court of law or a court of chancery but a court of complete jurisdiction."

So that the trial judgment, in too many instances, is wanting in effect. It is wanting in finality in the literal sense, it is but the cue for numerous appeals, countless motions (can it be said) by "ceaseless lawyers with endless tongues." It should generally be the last step before plucking its fruit, the cash: it too often is but the resting place, which is converted into a gloom of perplexity, as the astute counsel, on either side, unravel and

lay bare to the unsophisticated judgment creditor the tortuous paths through which, by way of appeal, the judgment debtor may wander ere he pays up. Then it is that the successful suitor sees the barrenness of a trial judgment which he may not convert into cash until the defeated debtor shall have enjoyed, not merely another "day in court," but perhaps years of vexatious litigation wherein the hapless case may run the endless gamut of half a dozen appellate courts, while with tedious iteration and re-iteration every imaginable law point is threshed out and re-threshed *ad nauseum*. Then it is that the successful suitor has his eyes opened to the cumbrous appeal machinery and its costly engineering, which may be fired up for a journey around the world of technicalities and fictions in the law: then he first learns perhaps that some general question of public policy has reached the surface in his little case, and the public weal constrains a long drawn out graded series of

arguments in appeal, based upon printed records costing even thousands of dollars, wherein two militant arrays of legal disputants hold forth learnedly for perhaps the balance of the judgment creditor's natural life.

All this suggests that while the modern lawsuit is a marked and happy improvement upon its prototype of a century or even fifty years ago, there is still much room for reform leading to literal finality of the trial judgment. Its "effect and conclusiveness," a theme so familiar to the practitioner, could be scaled much closer to the perfect, if some law commission, fused deeply with business methods, might frame the reform in procedure cutting out the remaining technicalities and delays wherever consistent with justice and fair play. By such a movement the trial judgment will be the end, or generally speaking in sight of the end, of the forensic contest: in other words it will have its intended "effect and conclusive-

ness." By such a movement, the poor and the rich, the "casual suitor" and the "chronic litigant," will measure up by the one standard, or at any rate there will be an approach to that Utopian end.

Of course it goes without saying that many of the salutary rules of practice and procedure, under which judgments may successfully be attacked, are too wisely and soundly based to be disturbed. Moreover we find, under modern law reform, marvellous advances along the line of liberalized amendments to pleadings to conform to the evidence and to the judgment which that evidence will warrant.

A judgment is now often allowed to the successful party with a faulty pleading where amendment however tardy can make it fit, subject of course to fair and reasonable restrictions as to the substantial justice of the case.

This is a wise liberalizing as to the power and discretion of both trial and appellate judges, getting at the end of

litigation more speedily and giving fair play at less cost. It really emphasizes that the trial is for the chief purpose of *getting at the truth* of the issue, that *cost and delay* are equally foes of fair play and foes of the wise administration of justice.

By such reforms in practice and procedure the discreet judge may do much to put just judgments into immediate execution, and much for fair play to the "casual suitor" against the "chronic litigant," provided the latter is clearly in the wrong on the merits, while as ever fairly holding the scales for both veteran and recruit giving equal rights to all and special privileges to none.

CHAPTER 13.

THE APPEAL: ITS PURPOSE.

Since a trial judgment, won after a fair fight bringing out the truth of the issue under the pleadings, is a barren victory to him who can realize nothing on that judgment, it often becomes even worse than a mere barren victory, through the perils and uncertainties of the appeal. On the other hand, a trial judgment does not exactly sound the death-knell to the honest suitor who may have met defeat. He sees hope, often a bright prospect of fair play, by way of appeal.

The purpose of the appeal is fair play and legal rights to the honest litigant against whom the trial judgment has been pronounced or the verdict at the trial has been returned. The appeal is of course an *essential* in the administration of justice. A trial without the right of appeal is tyranny, except in those cases which by

their very nature cannot fairly or reasonably be subject to appeal.

The appeal then is, on its face and in substance, admittedly a bulwark under a free constitution. So long as honest men differ, litigants will demand the right of appeal.

It is therefore not the appeal itself, but the *abuse* of the privilege of appeal, which meets the condemnation of lovers of fair play in court procedure.

The leading minds of bench and bar are foremost in the agitation against a system which encourages and promotes *cumbrous and costly* appeal activities, in the way of too many appellate courts and too many distinct and expensive motions and arguments beyond the ken and beyond the pocket of the honest, plain, everyday bread-winner who, perhaps once in his whole natural life, asks the court to "remedy a wrong." When the trial judgment is pronounced against the "chronic litigant," he often cares not a snap how

the *trial* judgment goes provided the appeal machinery will bring him the *ultimate* decision or *wear out* his inexperienced antagonist. It practically closes the door to the poor suitor. He prefers to endure without protest. He hesitates to set the law in motion, fearing that winning a verdict or a judgment at the trial is but a small part of the contest and that in the end, even if he wins, he comes out of the fray wrinkled and denuded after a life-long litigation.

The appeal is not allowed, nor was it ever intended, to rob the honest suitor of his well-earned judgment; but the ingenuity of the "chronic litigant" is such and has been such, that he rides a coach-and-four through the *spirit* of the laws and of the rules of procedure. He, too often, makes good the boast that whatever the jury may do *on the evidence* he can undo *on appeal.*

It may be contended that the constitution of the courts, if not the rules of prac-

tice and procedure, negative any such boast. Yet many are the instances where several costly appeals from one court to another have so terrorized the plain bread-winner that he will tamely "suffer the wrong" rather than litigate.

The appeal is prescribed, broadly speaking, to correct errors at the trial. Disregard of the law or of the evidence may constitute potent grounds of appeal. Flagrant instances of such disregard cry loudly for the privilege of appeal. The relief so sought is, in the main, granted by the appellate court and is an overwhelming reason for its existence.

In proper cases the appeal is an undeniable safeguard for liberty and justice. Without the right of appeal there is no safety valve, when error prevails, when the trial is conducted in disregard of the laws of the land and the evidence in the case.

Nobody can rationally dispute the right of appeal in such cases. This is why

the "chronic litigant" may so often wiggle into the unmaking of the "casual suitor." The "chronic litigant" works on the theory that the appeal is rarely shut against any defeated party who has "expert ingenuity."

Relying on that vicious theory the "chronic litigant" flaunts shamelessly through the courts, marking *time* and making *costs*. To him the purpose of the appeal is delay and cost beyond the means of the "casual suitor."

When reform in procedure cures this evil the humble shall be exalted.

Hence we have, right now, thinking judges and thinking advocates asking this very question: "What are the exact purposes of the appeal?" They urge (a) the cutting down of bulky printed appeals (b) the numerical reduction of appeal courts (c) the cutting out of technicalities.

Neither bench nor bar is fully satisfied with the extent to which modern law

reform has amended the old system of procedure. While they proudly recognize the casting overboard of the major part of the technicalities and legal fictions of the olden days, they are not blind to the many outstanding defects in rules of law and of procedure under which the patient suitor still groans. They realize only too painfully that until the procedure of the courts is abreast of modern business methods and procedure, there is a blush coming. They see, from term to term, that until the *cost* of appeal records is pruned down, there is a blush coming. They see too that until the *number* of appeals open to the "chronic litigant" is pruned down, there is another blush coming. Again, they see that until the parties to the appeal may take part in it without *prohibitive travel*, there is still another blush coming.

The purpose of the appeal, in the last analysis, is simply this: to enable the appellant to attack a verdict or judgment or

decision into which prejudicial error has crept, and that without undue appeal *costs* or *delay* or *travel.*

The watchword is, reform in appeal procedure. It is argued that delay is the sole purpose of appeal in many of the clearest cases; in which appeal is wrong and ought to be denied. It is argued too that in many clear cases the sole purpose of appeal is to "freeze out" the poor but honest suitor; where again the privilege of appeal is wrong.

It is a matter of comment, that individual and conflicting opinions in appeal might wisely be supplanted by a reform, under which a majority and a minority decision, respectively, for and against the appeal would suffice if the court were not of one mind, and that an *odd* number on an appeal bench shortens the litigation.

CHAPTER 14.

THE EXECUTION: ITS END.

Where a judgment creditor looks backward and recalls, with mingled feelings of pride and humiliation, all he achieved and all he suffered on the path of glory and of rebuke as he fought valiantly for that judgment, he fondly anticipates the fruit of the judgment.

If the judgment debtor be a good quitter, prompt and solvent, he may pay the judgment. If he fail or neglect to pay, the final step is to realize the judgment by the writ of execution.

The execution in the sheriff's hands may in its turn meet with prompt payment, thus closing the contest by satisfying the judgment. On the other hand the sheriff, armed with the power of the law, may be unable to find any goods from which to realize the amount of the execution. This means a return of "no goods,"

and the real property of the execution debtor may be covered by filing the writ.

The exemptions from execution differ widely in different law districts. In some law districts the execution debtor is most indulgently protected and, under the head of necessaries for himself and family, a homestead and ample furniture with specified provisions and tools and implements of his calling are exempt. In other districts the exemptions are closely restricted in number and value.

Generally speaking however the debtor is now treated so humanely that a dwelling and strictly necessary furniture and provisions are saved from the writ. In such cases the judgment creditor may, as against an insolvent debtor, be unable to realize. This is one of the risks necessarily borne by even the winner of the modern lawsuit.